

NO. 89-1770

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TeleSTAR, Inc.,

Petitioner;

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent;

MCI COMMUNICATIONS CORPORATION,
WESTERN TELE-COMMUNICATIONS, INC.,

Intervenors.

PETITION FOR WRIT OF CERIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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DATE FILED: February 26, 1990
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QUESTIONS PRESENTED

1. Should appellate review be "cutoff" for the reason of failure to prosecute "remanded hearings" that were probative abuse of process, and were enacted at the request of no party and despite there already existing a thorough record from three-and-a-half years of Federal Communication Commission (FCC) hearings in what were termed "exhaustive proceedings" by then FCC Chief of Enforcement Division, Gregory Vogt, who implored that "remanded hearings" would be inequitable, wasteful of government and other parties resources and would unlikely produce any relevant evidence not already adduced?

2. Does exhaustion of administrative remedy extend to unlawful proceedings that violate Fifth and Fourteenth Amendment due process and are invoked as a precursor to unprecedented FCC-sponsored settlement negotiations for a single-applicant licensee by a Commissioners triumvirate that had

shown to have vacated its function to outside influences, since when convening such negotiations the "essential element" was granting TeleSTAR its FCC licenses (and rescinding concurrent "remanded hearings") only if, in exchange (in private contracts), it would agree to demands of competitors, MCI Telecommunications Corporation (MCI) and Western Tele-Communications, Inc. (WTCI), of which the principal tenant was exculpation from antitrust litigation (now pending, Case No. 89 C-0068-S, United States District Court Of Utah, Central Division)?

3. Whether in any case, it was clear error to have avoided deciding what became the critical question, whether the single element ultimately relied upon for disqualification existed, whether TeleSTAR had, in fact, been assigned the risk of nonpersuasion in the designation order or in the "remanded order" on the presumption that it had and therefore could be defaulted on the basis of evidence the Commissioners

found impossible to resolve one way or the other, but then did so arbitrarily, when TeleSTAR refused during FCC-sponsored settlement negotiations to grant antitrust immunity to competitors, MCI and WTCI, whereupon the same "insufficient evidence" became the basis for levying the ultimate sanction of disqualification?

4. Because in related cases involving MCI's and WTCI's more egregious and "repeated" FCC violations that were decided during "closed-door-restricted proceedings" by the Commissioners using very divergent processes and standards of adjudication, inter alia, where no attempt was made to procure testimony from key witnesses but on the contrary the FCC procured their absence by conducting absolutely no evidentiary process, should review be granted to thereby delineate between what is protected administrative remedy and what constitutes violation of Fourteenth Amendment equal protection and is also inconsistent with

prior rulings for the United States Court of Appeals For The District of Columbia for equal treatment of petitioners on concurrently decided cases?

5. Should review be granted to resolve a conflict between the District of Columbia and Ninth Circuits as well as this Court on what is requisite administrative remedy or what amounts to capricious and futile "remand hearings" intended for no other reason than forcing upon TeleSTAR the alternatives of either comporting with competitor's demands to grant immunity from antitrust litigation or of becoming subjected to contrived administrative attrition while also being cutoff from judicial review of acts of the Commissioners which manifestly are not their purview?

6. Whether TeleSTAR faced a partial and biased tribunal that consistently favored MCI's and WTCI's interests and repeatedly ignored the FCC's own trial counsel's and staff's recommendations?

A LISTING OF ALL PARTIES

Petitioner: TeleSTAR, Inc. (TeleSTAR) is not a subsidiary or has no subsidiary companies.

Respondent: Federal Communications Commission (FCC)

Intervenor: MCI Telecommunications Corporation (MCI) is not a subsidiary or has no subsidiary companies.

Intervenor: Western Tele-Communications, Inc. (WTCI), a wholly-owned subsidiary of WestMarc Communications, Inc.

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OFFICIAL AND UNOFFICIAL REPORTS

1. TeleSTAR, Inc. v. Federal Communications Commission, D.C. Circuit Case Nos. 88-1420 and 88-1445, "Order" (denied) TeleSTAR's petition for rehearing, entered November 27, 1989.

2. TeleSTAR, Inc. v. Federal Communications Commission, D.C. Circuit Case Nos. 88-1420 and 88-1445, "Order" (denied) TeleSTAR's suggestion for rehearing en banc, entered November 27, 1989.

3. TeleSTAR, Inc. v. Federal Communications Commission, D.C. Circuit Case Nos. 88-1420 and 88-1445, "Judgment" (affirmed) entered September 22, 1989 [no published opinion pursuant to R.14(c)].

4. FCC Docket No. 85-202, Memorandum Opinion And Order, FCC 88-171, applications denied, released May 19, 1988.

5. FCC Docket No. 85-202, Memorandum Opinion And Order, FCC 88M-1113, dismissed, released April 15, 1988.

6. FCC Docket No. 85-202, Memorandum Opinion And Order, FCC 87-374, remanded for further hearings, released December 3, 1987.

7. FCC 88-24, Order and Notice of Apparent Liability, (D.C. Circuit Nos. 88-1153 and 88-1419 pending) assessed \$10,000 forfeiture on MCI Telecommunications Corporations for FCC violations, released January 25, 1988

8. FCC 89-132, Order On House of Representatives Investigation of the FCC regarding disparate treatment of petitioners in the cases of TeleSTAR, MCI and WTCI, released April 28, 1989.

THE JURISDICTION OF THE COURT AND DATE OF ENTERING JUDGMENT

The jurisdiction of this Court is established by 47 U.S.C. 402(b)(1) and (6) (1982). The date when the District of Columbia Circuit Court of Appeals for the United States of America (D.C. Circuit) rendered its "Judgment" which denied a petition for rehearing was November 27, 1989. The petition for rehearing was filed resultant from the previous "Order" of the D.C. Circuit Court entered September 22, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws".

47 U.S.C. Section 309(e): (see Appendix)

47 U.S.C. Section 312(a): (see Appendix)

5 U.S.C. Section 556(d): (see Appendix)

STATEMENT OF THE CASE

Competitors Illegal Construction --- Commissioners' Disparate Treatment

In 1982 MCI illegally constructed at least two significant microwave networks. One, MCI's Glenshaw/Erie network located in the Amish Country of Pennsylvania, had construction operations commenced in the Summer of 1982. 1/ This was six months before MCI would receive any FCC authority of any kind for undertaking such construction. MCI's illegal construction of the Glenshaw/Erie network shows the distinction between its treatment by the FCC and that afforded TeleSTAR some three years

1/ MCI was cited by the FCC and paid a \$10,000 forfeiture for numerous illegal FCC operations pursuant to TeleSTAR's petitions for revocation, which were committed over a several year period including:

(1) Five separate incidents on separate routes of illegal construction of microwave networks from 1982 to 1987; (2) Two instances on separate networks of illegal radio transmission; (3) Two instances on separate networks of illegal FCC frequency coordination; (4) Five instances of making false statements on applications.

later, when as a novitiate FCC applicant it had unwittingly undertaken illegal construction (see 6/ infra).

Within a total of nine days from when MCI's management and legal counsel requested and was granted Special Temporary Authority (STAs) pursuant to FCC 21.25(a) on December 22, 1982, to construct and operate its Glenshaw/Erie network until December 31, 1982, when MCI informed the FCC that the network was totally completed and had become operational transmitting radio signals was the extent of the time (including weekends) for the ostensible construction, testing and cutover for this facility. This involved completing an over 100-mile network with several microwave repeater site locations that each had 300-foot towers with multiple ten-foot dish antennas and waveguides attached to them.

MCI, in responsive briefs some five years later to TeleSTAR's petition for revocation, devoted a single paragraph to

explain this illegal construction, saying in effect it had all been inadvertent and the fault of construction workers. The Commissioners, too, saw fit to devote a simple paragraph in their Order (see Appendix 115) rendered not in any evidentiary process, but in "closed-door-restricted proceedings", for explanation of why MCI's serious construction violation was attributable to an inadvertent "breakdown in company communications" and MCI's management remained unapprised. It might be added, why was no hearing thought essential to find out? FCC Policy Regarding Character Qualifications, 102 FCC 2d 1179, 1218 (1986) states,

"A Corporation must be responsible for the FCC-related misconduct occasioned by the actions of its employees in the course of their broadcast employment. To hold otherwise would, inter alia, encourage corporate owners to improperly delegate future misconduct. ...Merely standing back and waiting for disaster to strike or for the Commission to become aware of it will not insulate corporate owners from the consequences of misconduct."

It seems doubtful that the framers of such Policy on Character had in mind the resulting Commissioners' penalty of payment of a paltry \$10,000 fine for extensive "repeated" violations and misrepresentations that occurred here (see 47 U.S.C. 312(a)).

During TeleSTAR's "exhaustive [FCC] proceedings" convened for a single incident of illegal construction as a would-be new competitor of MCI, MCI had stated in responsive briefs,

"...To allow TeleSTAR to benefit from its violation would signal licensees that premature construction is nothing more than a 'business risk'. The Commission will be providing incentive for businesses to build unlawfully the systems they desire, facing only a penalty should they get caught..."

MCI's position throughout this proceeding has been clear. The Communications Act and the Commission have established rules to ensure equitable use of the electromagnetic spectrum. The Commission must continue to administer those rules to ensure that each company plays by the same rules, and ensure that the communications industry is not plunged back into the cacophony of the 1920's." (emphasis is supplied)

It seems apparent that MCI was willing to take great risks including the spectrum of those afforded in violation of FCC or local regulations; did they believe they had assurances that the Commissioners would back them up and even cover-up?

At least one other MCI network was illegally constructed during 1982, MCI's Downers Grove, Illinois to Pleasant View, Illinois network. This network was another involving very unusual circumstances at the FCC. MCI commenced construction soon after filing its applications without FCC licenses and without any STA. MCI's 435 applications were filed at the FCC on May 10, 1982 and the network became operational on August 23, 1982, even though an FCC construction permit was not granted until July 7, 1982 to commence building. This 200-mile network also involved extensive construction of eight totally new microwave sites with 300-foot towers attached with multiple 10-foot dish antennas.

This incredible lack of enforcement against MCI, while holding "exhaustive hearings" and "remanded hearings" on TeleSTAR, is clearly illustrative of the Commissioners disparate treatment of petitioners in these contemporaneous proceedings, inconsistent with precedent for equal treatment for concurrently decided cases, Melody Music, Inc v. FCC ("Melody"), 345 F.2d 730, 732-3 (1965); Secretary Of Agriculture v. United States ("Secretary Of Agriculture"), 74 S.Ct 826, 831, 347 U S 645, 650, 98 L.Ed 1015, 1020 (1954); and Automatic Canteen Co. v. Federal Trade Commission ("Canteen"), 73 S.Ct 1017, 1028, 346 U S 61, 72, 97 L.Ed 1354, 1365 (1952). It also exemplifies their reluctance to hold evidentiary processes to adduce the facts on MCI in the face of unquestioned material facts, Citizens For Jazz On WRVR v. FCC ("Citizens"), 775 F.2d 392, 395-7 (1985). This was against the FCC's mandate as an enforcement agency, since the Commissioners

have at their disposal the wherewithal to elicit the facts from MCI. They simply chose not to do so, particularly as relating to possible misrepresentations. On this basis alone their deliberations on TeleSTAR's applications (D.C. Circuit 88-1420 and 88-1445) are prejudiced, Amos Treat & Co. v SEC, ("Amos Treat") 306 F.2d 260, 263-4, (1962) and Harold Winthrow v. Duane Larkin ("Winthrow"), 96 S.Ct 1456, 1464, 421 U S 35, 43, 43 L.Ed.2d 712, 720 (1975) one man or twenty in a tribunal who is biased violates 'due process' -- a fair trial in a fair tribunal is a basic requirement of "due process".

During 1985, while MCI was participating in TeleSTAR's hearing and expounding misleading statements to those adjudicating the case, to the effect that "all should play by the rules", it again was undertaking what proved to become a virtual "hornets nest" of illegal operations. This included illegal frequency coordination;

supplying certifications and other statements of fact to the FCC that were purposely false and misleading; illegal FCC construction in violation of FCC Section 21.3(b); and illegal construction without local San Bernardino County, California, building and zoning permits.

In its FCC 435 applications submitted to the FCC on June 7, 1985, MCI supplied signed certifications to the FCC that,

"Frequency coordination with other carriers has been successfully completed and a showing to this effect is included with the instant applications for construction permits".

This certification was not an innocuous mistake, it was a bold-faced misrepresentation of the facts to the Commission, since MCI was well informed of outstanding serious frequency interference cases into the down links of earth stations owned by Dickinson Cable Systems and by Chambers Cable, Inc. In 1983 MCI filed the same misleading certifications in regard to

frequency clearance with United Video. In 1981 it did the same to Southern Bell. The Commissioners response to MCI's false and misleading certifications could be predicted: in their decision, they would not make the nexus between purposely false certifications and MCI's "lacking candor" even though MCI was fined for the incident.

Another example is contained in MCI's responsive briefs where its legal counsel stated that its illegal installation of two antennas on its Sidewinder repeater site had been a mistake, since the antennas were six gigahertz antennas for which MCI claimed it did not have frequency rights-of-way. Here again, this amounted to a purposeful false statement to the Commissioners by MCI's management and legal counsel, since as TeleSTAR had shown in attachments containing relevant copies thereof, MCI did have frequency rights-of-way, termed Prior Coordination Notices (PCNs) filed for these antennas and for a microwave network

utilizing these antennas. These PCNs were on record with MCI's frequency coordination firm, Comsearch, Inc. and had been submitted in attachments to TeleSTAR's petition filed with the FCC. Yet, the Commissioners do not even mention this fact (see Appendix 116) that was repeatedly and clearly at issue and emphasized in TeleSTAR's briefs.

On MCI's Gridley and Earle repeater sites for its Sacramento to Chico, California, network it had illegally commenced construction that was actually reported and photographed in the local media, the Gridley Herald. This illegal construction for this network was also reported in two MCI internal memos involving minute planning and participation by upper echelon management and legal counsel. One of these MCI internal memos sent between its upper echelon legal counsel and management definitely belie this assumption of a compartmentalized management that was unaware of and did not participate in MCI's illegal operations,

"According to Joe Cook, construction has not stopped at Erle. Our consensus is that we should construct everything prior to stirring up dust by going in for an electrical permit. We can always, if need be, use a portable generator while the hearing process is underway. Based on your information, will this tactic work?"

This MCI memo, obtained by TeleSTAR from documents that had been inadvertently supplied in responsive briefs, was sent to Stephen Kay Smith, MCI's Senior Zoning Attorney from Richard Strom, MCI's Senior Attorney For General Counsel. Joe Cook is MCI's Director of System Engineering. This is certain evidence that these MCI top management people, not construction workers, as asserted by both MCI and the Commissioners, had planned and participated in illegal operations. MCI's management and legal counsel made deliberate preparations and carried out illegal operations to violate Yuba County, California building and zoning regulations and to mislead local officials. MCI's legal counsel and management here were preparing to "run on

generators" to avoid detection by the power company since when coming to hook-up commercial power it would have inquired about electrical and building permits, which MCI obviously did not have.

In addition, these memos depict that not only were significant persons throughout MCI's organization willing to deceive and mislead whoever necessary at Yuba County to accomplish the ends MCI had determined, but later MCI's management and legal counsel were prepared to elicit false affidavits and supply deliberate misleading and false statements to TeleSTAR and the Commissioners in responsive briefs regarding these matters. MCI claimed in such briefs that it did not know about the requirement for Yuba County building permits (OPP, n26, at 21).

When this and another MCI internal memo were brought to the Commissioners attention in a TeleSTAR brief, they claimed to have misplaced the brief, even though it was sent and signed for at FCC offices. Later after

the existence of the brief was challenged by a member of the media the Commissioners issued a supplemental decision, which ignored the significant ramifications of these MCI internal memos. They were unwilling to make any connection between the memos and their absurd conclusions that MCI's management was totally compartmentalized from any knowledge of its illegal operations which were incredibly assigned to construction workers, including multimillion dollar expenditures necessary to have built such facilities.

The Commissioners inveterate presumptions do not hold with sound logic of any reasonable interpretation of such evidence nor with their subsequent treatment of TeleSTAR such as, without explanation, dismissing concurrent documentation such as shareholders letters that Bureau staff found conclusive of TeleSTAR's innocence. This is borne out in Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co, Interstate

Commerce Comm'n v. Aberdeen & Rockfish R Co.
("Baltimore"), 89 S.Ct 280, 283, 393 U S 87,
97, 21 L.Ed 219, 229, (1968); and United
States v. Carolina Freight Carriers ("United
States"), 62 S.Ct 722, 729, 315 U S 475,
482, 86 L.Ed 971, 978 (1942), administrative
decisions must be supported by substantial
evidence and there must be essential
findings to support conclusions or a
"monster which rules with no practical
limits on its discretion" is created.

Similar events occurred on WTCI's
illegal operations. For instance, WTCI
accomplished illegal construction of its
Sodrac microwave system that became
completely operational without any record of
issuance of FCC licenses necessary for such
construction and operation. "FCC certified
copies" of all station files for this route
were obtained by TeleSTAR; no licenses
appeared for this WTCI network. The only
explanation offered by WTCI was to supply an
"in-house" document without any FCC record

of receipt or acknowledgement. WTCI's unrecorded "in-house" authorization was accepted on face value by the Commissioners to expunge any illegal operation asserted by TeleSTAR, for want of which WTCI had both illegally constructed and operated this facility. Similar illegal construction of WTCI's Spokane/Coeur d'Alene network was unexplained, including a 20-day retroactive STA issued by the FCC that was several weeks short of covering WTCI's illegal operations. Affidavits and statements of disinterested third-party witnesses (including Marlin Herrick, a WTCI subcontractor, for this network) supplied by TeleSTAR were ignored and WTCI's statements were credited on face value without any evidentiary process. As in MCI's case not a single witness was called or seated to adduce the facts, (cross examination for administrative cases is required) William L. Greene v. Neil M. McElroy 79 S.Ct 1400, 1413-14, 360 U S 670, 683-4, 3 L.Ed.2d 1377, 1390-1 (1959).

TeleSTAR's Construction And FCC Applications

TeleSTAR, a complete novice and would-be new competitor in the microwave common carrier market after being funded by \$3.5 million in private funds, partially constructed mountain-top microwave sites for what was to be its first digital network which offered advanced and first-of-its kind enhanced services to customers in the Salt Lake City/Denver region. TeleSTAR had obtained critical frequency and route clearances for its network by outside engineering consultants for radio spectrum coordination with existing users, including competitors, MCI and WTCI (there were no technical objections to TeleSTAR's network either by the FCC or competitors). In addition, TeleSTAR obtained all local and environmental clearances for its microwave network. But because it was ignorant of the necessity to do so and had not been instructed by its FCC legal counsel of the

requirement for FCC construction permits, for buildings and towers for which TeleSTAR had obtained all local building permits it unwittingly commenced site construction without FCC licenses. 2/

After first attempting to purchase TeleSTAR's network and its offer being declined, WTCI filed complaints against its would-be rival at the FCC, alleging illegal construction and a deliberate attempt to violate FCC regulations. WTCI was joined in its complaint by Mountain Bell (a U.S. West, Inc., Bell Operating Company) and MCI. Both WTCI and MCI asked for TeleSTAR's

2/ The FCC's trial counsel Chief of Hearing Division, James O. Juntilla, and FCC Trial Attorney, Frederick Fitzgerald, in their Common Carrier Bureau Proposed Findings Of Fact And Conclusions Of Law ("CCB's Findings"), at 19, found "the very openness of the construction is persuasive that it was innocent"; this was in addition to their finding that TeleSTAR's witnesses "were forthcoming witnesses, and their denials of knowing violation are credible." On this basis they recommended TeleSTAR pay a \$5,000 forfeiture and be granted FCC licenses.

disqualification on "character grounds" alleging throughout the ensuing three-and-a-half year proceedings that "they were there to ensure that all played by the same rules". TeleSTAR's construction had been carried out in full view of the world including its competitors, MCI and WTCI.

TeleSTAR's several letters to its over fifty sophisticated shareholders that were concurrent with its illegal construction corroborate this point. For instance in the June 7, 1984, shareholders letter, at 7 (J.A. 341), it states (Appendix 174-180),

"The events ahead are: (1) Prior coordination (User Notification), (2) construction acquisitions and preparations, (3) site acquisition and formal leases on privately owned sites, (4) implementation of Phase II construction (low cost items and pre-fabrications), (5) finalization of User Notification coordination, (6) public notification, (7) FCC granting of CP and final constructions... Some preliminary constructions of towers and other items will soon be underway. After the 30-day User Coordination is over -- anticipated time-frame is mid-July some private sites will be obtained and construction phase will begin on certain sites. Upon finalization of public notification and granting of CP by the FCC the

construction process will be well underway. Tower and shelter designs are being completed now in preparation for the construction phase."

In another shareholders letter (July 14, 1984) TeleSTAR's President informed its shareholders, at 4 (J.A. 346) that,

"After prior coordination, as previously mentioned, a 435 Form will be filed with the FCC for an FCC construction permit (CP). The FCC CP will usually be granted after an additional 30-day public notice by the FCC.

Hopefully, before receiving the FCC CP, most of the private sites will be constructed which will leave 2-3 remaining sites to be completed during September after receiving the FCC CP."

There is no question, as the Commissioners later also readily admit in their Memorandum Opinion And Order ("Remand Order"), FCC 87-374, released December 3, 1987, that TeleSTAR's contemporaneous letters to shareholders readily admitted an intention to construct facilities before receiving any FCC licenses. Could there have been any motive other than ignorance for informing

fifty sophisticated shareholders who had their own legal counsel of supposed expertise on FCC matters (who had written significant FCC clauses in a shareholders agreement) that TeleSTAR was using their \$3.5 million investment to illegally construct sites (several of TeleSTAR's outside investors were involved in the decision to construct its sites)? The Commissioners were to state in the "Remand Order", at 8 (J.A. 947-8), that "at first blush" such shareholders letters were convincing, but they never go further in their "Remand Order" to state why such contemporaneous documents are not conclusive. FCC trial counsel and staff, including FCC Chief of Enforcement Division, Gregory Vogt, were convinced of the probative value of such evidence to establish TeleSTAR's innocence (see Vogt's brief -- Appendix 171-182).

The Hearing Designation Order And FCC Hearings

The FCC issued a hearing designation order Notice of Apparent Liability And Order Designating Applications For Hearing ("Designation Order"), released June 21, 1985, designating TeleSTAR's applications for hearing. Prior to this time the FCC had rendered a decision, that without saying so had effectively relegated the FCC construction authority to a ministerial act. In King Country B/casters v. FCC ("King"), 55 RR 2d 1591 (1984), an entire system including radios was constructed without FCC licenses, but no FCC forfeiture resulted, even though competitors, as herein, had asserted "lack of candor" with the FCC.

In Christian Broadcasting of The Midlands, Inc. v. FCC ("Christian"), 60 RR 1391 (1986) the FCC distinguished the illegal construction that had been given the benefit of its interpretation in King. Yet both Eagle Telecommunications v. FCC

("Eagle") 59 RR 2d 1243 (1984) and Pappas Telecommunications in "Christian" were given the benefit of "King".

TeleSTAR's case, however, which fell within the intervening time period (between King and Christian) was given the ultimate sanction of disqualification requested by competitors, MCI and WTCI, who did not avail themselves to ensure that Eagle "played by the same rules". Surprisingly in Eagle, which had not halted its construction but placed its illegal system into operation and defied the FCC's cease and desist order, and even though competitors in Eagle asserted Eagle's defiance as further demonstrative of "bad character", it was granted FCC licenses upon payment of a \$20,000 forfeiture.

TeleSTAR's case is distinguishable in FCC precedent for receiving disqualification (even though a new entrant) for matters involving a construction violation, including when character issues are designated by competitors as issues, such as

the above cases and also in the cases involving MCI and WTCI, who committed such violations extensively as seasoned licensees of twenty years or more.

The Designation Order from the Bureau explicitly allocated to TeleSTAR the burden of proceeding with evidence on all factual and conclusory issues, but allocated the burden of proof to TeleSTAR only on conclusory issues. Designation Order, para. 16-17 (J.A. 149-50), states,

"16. It is further ORDERED that the applications of TeleSTAR for the common carrier microwave facilities in the instant case ARE DESIGNATED for hearing in accordance with Section 309(e), upon the following issues:

(1) To determine the facts and circumstances surrounding the construction by TeleSTAR of the facilities for which it has applied for construction authority;

(2) To determine, in light of the evidence adduced above,

(a) Whether TeleSTAR constructed the aforementioned facilities in violation of Section 21.3 of the Commission's rules, 47 C.F.R. 21.3, and whether such construction was effectuated with the knowledge that the construction was in

violation of Section 21.3(b) Whether
TeleSTAR is qualified to be a
Commission licensee;

(d) Whether a grant of TeleSTAR's
applications would serve the public
interest, convenience and necessity;

(e) Whether, in light of the
determination of Issues (2)(d), an
Order of Forfeiture should be issued
pursuant to Section 503 of the Act, 47
U.S.C. Section 503 and Section 1.80 of
the Commission's Rules, 47 C.F.R.
Section 180 in the amount of \$5,000 or
whatever lesser amount is determined to
be appropriate.

17. It is further ordered that
TeleSTAR shall have the responsibility
to adduce evidence on the issues set
forth above, and that the burden of
proof on the conclusory issues set
forth above shall be placed on
TeleSTAR. 19"

Despite the language in the Designation
Order, ALJ Miller and the Commissioners
presumed that TeleSTAR had the burden of
nonpersuasion on all issues not just the
conclusory issues, i.e., whether a grant of
TeleSTAR's applications would serve the
"public interest".

Proposed Findings Of The FCC Common Carrier Bureau

After four days of hearings referred to later by FCC Chief of Enforcement Division, Gregory Vogt, as "exhaustive proceedings" the Common Carrier Bureau, who had designated the case for hearing in the first place, and whose delegated duties include advising and making recommendations to the Commission in adjudicatory proceedings [47 C.F.R. Section 0.91(a)] stated through two experienced trial counsel who heard testimony and observed TeleSTAR's witnesses, that TeleSTAR's principals' testimony had been "forthcoming", "sincere" and "credible". FCC trial staff also concluded that predesignation pleadings which may have been interpreted to mean that TeleSTAR read and disingenuously interpreted the rules were improvident or in error. Based on this the Bureau recommended a grant of TeleSTAR's licenses, but also asked for payment of a \$5,000 forfeiture (see n1, supra).

Initial Decision

In a long Initial Decision full of errors and omissions in a analysis, the ALJ essentially ignored the Bureau's findings and instead adopted MCI's and WTCI's findings; he branded the same TeleSTAR witnesses the Bureau had believed as consummate liars, who the ALJ represented, aside from anything in the record, would run stop signs and red lights with "knee-jerk" consistency if enforcement officers were not present.

TeleSTAR's Exceptions

Being careful to document every assertion in detail, TeleSTAR did not take lightly its burden of demonstrating that ALJ Miller's reasoning was faulty and that he prejudged the facts, reasoning backwards to arrive at his foregone conclusions.

The Review Board begrudgingly agreed with the Chief of the Common Carrier Bureau

that TeleSTAR did point to several negligent errors and at times evidentiary errors in the Initial Decision, but even though stating that it wanted to "draw the same conclusion the Common Carrier Bureau drew here rather -- at least in their proposed findings" the Review Board [during oral argument, Chairman Marino, at 1202, (J.A. 856)] instead adopted MCI's and WTCI's recommendations.

Again the Bureau's recommendations were ignored even though Frederick Fitzgerald stated again in oral arguments that TeleSTAR's witnesses were "forthcoming, honest and telling the truth as best they could... and that substantial evidence existed to support the Bureau's conclusions and recommendations" (oral arguments, transcript at 1235-6, 1245-6). Mr. Fitzgerald also made the startling admission that even though he had found TeleSTAR innocent that superiors were instructing him to support denial of TeleSTAR's applications

(oral arguments, transcript at 1241-2),

"I have been instructed by the Bureau to support the decision [Initial Decision by ALJ Miller] and to support denial of this application... My instructions frequently come from an interpreter of the oracle. I simply get the word to go this way"

James O. Juntilla, FCC Chief of Hearing Division, had retired, but Fitzgerald's incredible admission that superiors were instructing him to support denial of parties whom he and Mr. Juntilla had found "honest, forthcoming and telling the truth as best they can", was another indication of violation of due process that became a harbinger of things to come.

Gregory Vogt's brief to the Review Board in support of TeleSTAR's applications was ignored in the Review Board's Decision written by Board Member Blumenthal.

Review Board's Settlement Offer And Decision

Review Board Member Blumenthal offered TeleSTAR its licenses if it would agree to

excise the "Stewarts" from any ownership and after that offer was declined, made another offer to rescind ALJ Miller's decision if TeleSTAR would refile its licenses (J.A. 880-6). No apparent reason existed for refiling TeleSTAR's applications unless for the concern by Member Blumenthal admitted during oral arguments that he was interested about the antitrust ramifications of TeleSTAR's case (oral arguments, transcript at 1233),

"I, for one --- it may be interesting, it may not. In Antitrust Law. They could be waiting -- we always talk about these waiting in the wings doctrines, either the investors or the interested parties waiting in the wings."

This concern first expressed by Member Blumenthal became more apparent as FCC proceedings continued.

These unusual proceedings have made strange bedfellows: Board Member Blumenthal found himself supporting the Initial Decision by ALJ Miller although previously

calling for the ALJ's resignation because he was unfit in Las Americas Communications, Inc. v. FCC, 101 FCC 2d 728 (1985); the ALJ who previously had adopted FCC trial counsel's recommendations and received praise from the Commissioners, Mobilfone v. FCC, 96 FCC 2d 673, instead in TeleSTAR's case, totally ignored FCC trial counsel and adopted MCI's and WTCI's recommendations.

Application For Review

TeleSTAR sought review by the Commissioners on February 9, 1987. The Bureau initially filed a brief in support of TeleSTAR's review stating that (J.A. 918),

"...the Review Board made errors of substantive and procedural law".

This brief was withdrawn by Gregory Vogt's superiors. TeleSTAR protested this bizarre suppression of Vogt's brief. Evidently in regard to pending House Congressional investigations by John Dingell's Subcommittee on Oversight and

Investigations 3/, Vogt's brief in a new version that cited concurrent cases (of MCI's and WTCI's FCC violations) pending at the Commission was refiled with the Commissioners. In this brief once again, the Bureau advocated that TeleSTAR's witnesses were credible and that substantial evidence suggested a grant of FCC licenses. No party to the proceedings made any suggested or sought remand hearings on TeleSTAR's case.

The Commissioners' Remand Order

Ten months after TeleSTAR filed for review the Commissioners filed their "Remand Order" on December 3, 1987, and found it impossible to resolve the case one way or the other. The problem was they found the

3/ Subsequent to failed FCC-sponsored settlement talks in August 9, 1988, a bipartisan investigation of the FCC regarding the cases of TeleSTAR, MCI and WTCI was empaneled by the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, (see Appendix 159-68).

evidence was "insufficient" to either convict or grant the applications (this base on their presumption that TeleSTAR had all the burdens, including the burden of nonpersuasion).

Even though TeleSTAR had pointed out in its application for review that it did not have the burden of nonpersuasion 4/, only

4/ - When the burden of nonpersuasion is assigned to a party it has a significant outcome on determination of a case, particularly for negating all factual elements when charged with serious wrong Lawrence Speiser v. Justin A. Randall v. City and County of San Francisco ("Speiser"), 78 S.Ct 1332, 1342, 357 U S 513, 523, 2 L.Ed.2d 1460, 1470 (1958). This Court has held that an agency may issue a disciplinary order only when supported by "substantial evidence", Charles W. Steadman v. Security and Exchange Commission, ("Steadman"), 101 S.Ct 999, 1006, 450 U S 91, 98, 67 L.Ed.2d 69, 76 (1981); Baltimore, 89 S.Ct 283; United States 62 S.Ct 729. In ordinary usage, i.e., except in rare cases where the burden of proceeding with proof, is under consideration, the words "proof" and "prove" refer to the latter, 5 U.S.C. 556(d) of the APA reading "burden of proof" as referring only to the burden of proceeding, which TeleSTAR does not argue it had. Similarly 556(d) provides that the proponent of a rule or order has the burden of nonpersuasion. Simply because the (4/ continues...)

the burden of supplying the evidence, and the burden of proof on conclusory issues, the Commissioners did not even address the question.

(4/ continued...) Designation Order did not assign the burden of nonpersuasion to another party does not mean it was assigned to TeleSTAR. 47 U.S.C. 309(e) states that in cases where, as here, petitions to deny have been filed the Commission will determine the burdens, this is particularly crucial where serious character issues are present -- compare the treatment of MCI's and WTCI's cases. In United Scenic Artists v. NLRB, 762 F.2d 1027, 1034 (1985) it was held that a statutory requirement was not satisfied by administrative presumption, an agency is not free to ignore statutory language by making assumption on grounds of policy. In addition, it has not been the FCC's precedent to assign the burden of nonpersuasion to one charged with serious character issues that are potentially disqualifying D And E B/casting, 1 FCC 2d 789 (1965). Shifting the burden of nonpersuasion, ipso facto because the burden of proceeding with evidence was assigned to the applicant, is not availing, especially where, as here, the burden of nonpersuasion becomes the single element leading to the ultimate sanction of disqualification, while based on "insufficient evidence". In the Designation Order TeleSTAR was assigned the "burden of proof" only on the "conclusory issues" not on the factual issues; this delineation is well understood in FCC practice, Calhoun County B/casting, 104 FCC 2d 27 (1986); Martinez & Associates, FCC 86D-56 (1986), at 2, and was at issue here because of the allegations of MCI and WTCI.

The Commissioners did acknowledge as the Review Board noted and TeleSTAR had asserted all along that the ALJ had reasoned backwards from a predetermined presumption of guilt to arrive at demeanor findings that were non-existent ("never made").

Initially, the Commissioners dismissed as insignificant in themselves TeleSTAR's former counsel's statements using "proposes to construct" language 5/ in the "public interest statement" which was not ever seen by TeleSTAR's principals in advance of counsel filling the applications. The

5/ One matter treated as inconsequential in the "Remand Order" but treated quite differently in the Commissioners "Final Order" denying TeleSTAR's applications on the basis of previously "insufficient evidence" was the "proposes to construct" language appearing only in documents prepared by TeleSTAR's former counsel and not seen by company principals before it was filed with the FCC in TeleSTAR's 435 applications. These words were not viewed at all by principals until after the matter was designated for hearing. Indeed, former counsel in Opposition pleadings to WTCI's complaints used the "proposes to construct" language blithely when referring to the network which counsel by then of course knew was already constructed (except for radio (5/ continues...))

Commissioners also had noted that while it thought TeleSTAR had changed from knowing about the rules to losing sight of the requirement for construction, it did not

(5/ continued...) installations). The Commissioners biased scrambling to convict TeleSTAR is appallingly evident here in matters it previously found inconsequential, but then after-the-fact of failed FCC-sponsored settlement with competitors such inconsequential and fully explained events were used for a guilty verdict. By contrast similar "proposes to construct" language was used when referring to MCI's Glenshaw/Erie network (see Glenshaw/Erie supra) in two separate STA requests sent to the FCC in December, 1982, by MCI. These STA requests were signed by both MCI counsel, John Wells King, and Senior Vice President, Thomas Leming, even though, as MCI later admitted and was found by the Commissioners in their order and notice of liability, MCI had commenced critical FCC construction in violation of 21.3(b) during October, 1982; this was for a network that was completely operational on December 31, 1982. The Commission not only did not take any notice on this occasion that misrepresentations were apparent, but none was taken even after when during the FCC's "closed-door-restricted proceedings" for MCI such violations had been made known by TeleSTAR. The Commissioners, evidently, here and in many other instances, did not want to know why misrepresentations were supplied by MCI's legal counsel and senior management. This is another example among many depicting the patently disparate treatment of petitioners throughout these concurrent proceedings, Melody, at 732-2; Secretary of Agriculture, at 74 S.Ct 831.

have a copy of the Part 21 Rules prior to completing construction nor did the record indicate anyone had ever told it about the 21.3 construction prohibition. They noted that TeleSTAR was supplied a copy of the Rules after its construction was already essentially complete (with exception of installation of radios) on the eve of filing its 435 Applications by counsel. They castigated TeleSTAR for certification practices they said were "sloppy", but noted TeleSTAR was unlikely to have "lacked candor" when filing 435 Applications, since as the record showed no one had informed TeleSTAR on FCC prohibitions contained in Section 21.3 before that time.

The Commissioners demonstrated their underlying inconsistency, pervasive throughout the "Remand Order", when they inexplicably invited additional hearings before ALJ Miller to not only allow his revamping of previously "faulty demeanor findings", but to further adduce evidence on

all the issues, which earlier they had found were inconsequential.

The Commissioners never expressed any of the practical concerns in "Remand Order" that were subsequently pointed out by the Bureau, that witnesses after four years would unlikely remember testimony any better, and if they did it might be suspect; that such hearings would be "wasteful of the government's and other parties' resources; and unlikely produce any relevant evidence not already adduced" (see Appendix 178-82, Gregory Vogt's Comments On Petition For Reconsideration).

The most significant aspect expressed in the "Remand Order" was the apparent concern by the Commissioners of obtaining "demeanor findings" and they invited ALJ Miller to a "second bite of the apple" to reinvent "demeanor findings" to properly convict TeleSTAR aside from his foregone conclusions of guilty knowledge. Despite the Commissioners' apparent consternation they

were not without resources to have decided the case then, collateral demeanor findings existed from two experienced FCC counsel, including the Chief of Hearing Division, James O. Juntilla, and FCC Trial Attorney, Frederick F. Fitzgerald who had been present during the entire hearing and had made demeanor findings; see Moss v. Ross, 687 F.2d 604, 607 (1975), evidence of record can supplant credibility findings.

Petition For Reconsideration

TeleSTAR promptly filed a "Petition For Reconsideration" of the "Remand Order" on December 28, 1987, pointing out that the Commissioners were under a misapprehension as to the allocation of the burden of nonpersuasion, adding that the burden of proceeding on all issues had been assigned to TeleSTAR, but that it had the burden of proof only on conclusory issues but not the burden of proof on factual issues.

TeleSTAR pointed out the inconsistency in the Commissioners' findings and subsequent inconsistent requests for adducing further evidence, matters already concluded as inconsequential or fully explained, such as the finding that TeleSTAR had received the rules only on the eve of filing its 435 Applications, after completing construction of its sites, but then calling for additional evidence of why TeleSTAR took the position that it was ignorant of the rules prior to construction.

The Bureau supported TeleSTAR's position in its "Comments On Petition For Reconsideration" and was perplexed by any need for "Remand Hearings" in consideration of previously "exhaustive proceedings". The Bureau implored the Commissioners that determination of TeleSTAR's case "would not be enhanced or assisted by receipt of additional evidence" that remanded hearings called for by the Commissioners would be "inequitable and unfair, in light of

TeleSTAR's Chapter 11 Bankruptcy"; "wasteful of government and other parties resources"; and "unlikely produce any relevant evidence not already adduced". In addition, in a supporting brief the Bureau assured the Commissioners,

"The original hearings in this matter delved into the potential evidence in great detail and required the expenditure of considerable resources by this agency and the parties. The Bureau conducted a thorough examination of the record in light of the concerns expressed in the Remand Order. We continue to believe, as we did in our Proposed Findings Of Fact and Conclusions Of Law (Dec 19, 1985) that the record provides an adequate basis for a finding that grant of TeleSTAR's applications would serve the public interest."

The Bureau also reiterated that TeleSTAR's witnesses were "forthcoming, credible witnesses". The Commissioners, as admitted, in their "Final Order" (see Appendix 16-17) held up any determination on TeleSTAR's "Petition For Reconsideration" pending the outcome of FCC-sponsored settlement negotiations between TeleSTAR, MCI and WTCI.

Remand Proceedings

In the meantime, ALJ issued a further prehearing order (December 10, 1987) and then a supplemental further prehearing order (December 17, 1987). In the first he acknowledged his duty to make demeanor findings if he could, and seemed to suggest that he might be able to do so based on notes. In the second he volunteered his interpretation of the Commissioners' invitation as an ultimatum to produce again every witness that it had already produced in addition to scores of others identified only by classification in one of twenty categories, all with a view to carrying its onerous burdens. The ALJ sua sponte blocked out thirteen days to hear evidence from what would amount to over one-hundred-twenty witnesses in his various categories.

The Commissioners could not have missed the fact that prior to issuance of the "Remand Order" TeleSTAR was proceeding in Chapter 11 Bankruptcy and had been for

several years resulting from extensive protracted FCC proceedings. The very divergent processes in the concurrent proceedings of TeleSTAR, MCI and WTCI are utilization of evidentiary processes not for adducing evidence, but rather as threatened punishment to extract demands for competitors, Morgan V. United States ("Morgan"), 58 S.Ct 773, 775, 304 U S 1, 3, 82 L.Ed 1129, 1131 (1938) rudimentary requirements of fairplay necessary in administrative quasi-judicial proceedings to maintain public confidence; Boyd S. Leedom v. William Kyne ("Leedom"), 79 S.Ct 180, 185, 358 U S 184, 189 (1958), Congress requires judicial protection of courts against agency's actions in excess of delegated authority.

No party offered any new evidence at the "Remanded Hearings", TeleSTAR in advance stated it would attend the hearing but had no additional evidence not already adduced.

The primary reason for the Commissioners' "Remand Order" for allowing the ALJ to correct his failure to make "demeanor findings" was put to rest since ALJ Miller stated explicitly at the hearing that he had not observed any adverse demeanor in any of TeleSTAR's witnesses but based his credibility findings on other matters he understood in the record (hearing Tr. 1270-1).

Then, despite Gregory Vogt asking on behalf of the Bureau that the ALJ consider the anticompetitive result of what he was proposing and that no party had further evidence to adduce, ALJ Miller proceeded to dismiss TeleSTAR's applications for alleged "lack of prosecution". This was not before the ALJ referred to ongoing FCC-sponsored settlement negotiations as "star-chamber settlement proceedings before none other than the Commissioners general counsel".

Settlement Negotiations

If not before, by letter of January 5, 1988, when FCC-sponsored settlement negotiations on TeleSTAR's applications were requested between all parties of TeleSTAR, MCI and WTCI, the Commissioners' true motive for calling "Remand Hearings" on TeleSTAR was revealed. A settlement meeting in FCC offices ensued before the Commissioners General counsel, Bureau counsel, and counsel for TeleSTAR, MCI and WTCI. A "cessation of all hostilities" was required by TeleSTAR for successful outcome of the negotiations (see letter of March 3, 1988 from Howard Wilchins, Deputy Chief of Enforcement Division -- Appendix 183), i.e., TeleSTAR would receive its FCC licenses by agreeing in private contract to MCI's and WTCI's demands, the principal of which was rescinding antitrust potential. This rendered the Commissioners' "Remand Order" a farce, since FCC-settlement negotiations were not to adduce further evidence on the

questions the Commissioners had determined, and in convening such meetings it must necessarily be presumed that TeleSTAR's character had not undergone chameleon-like changes from "bad" to "good". This, by any measure, was a flagrant abuse of process and a violation of "due process", TeleSTAR was before a tribunal without safeguards and without trial and was being forced to barter for property rights (antitrust litigation) threatened by "Remanded Hearings". The Commissioners had created the specter of an administrative monster running amuck with its discretion, in the very least, bartering FCC licenses to those it later found of "bad character". In either case, this is a flagrant abuse of discretion and process, Federal Trade Commission v. Raldam Co. ("Federal"), 51 S.Ct 587, 590, 283 U S 643, 646 (1931); John P. Peters v. Oveta Culp Hoppy ("Peters"), 75 S.Ct 790, 797, 349 U S 331, 338 (1955); Motor Vehicle Manufacturers Of the United States; Consumer Alert; and

United States Department of Transportation

v. State Farm Mutual Automobile Insurance

("Motor Vehicle"), 103 S.Ct 2856, 2869, 463

U S 29, 42, 77 L.Ed.2d 443, 456 (1983).

Board Member Blumenthal's concerns on antitrust against MCI and WTCI were now being fully addressed by the Commissioners themselves, as attested by affidavit of MCI's counsel, John Wells King, who was present at the settlement negotiations (see Appendix 190-91),

"...When the trial staff and TeleSTAR sought MCI's imprimatur on a settlement providing for licensing a company that the ALJ and Review Board found unfit and that MCI considered unfit, MCI declined to give such imprimatur without the assurance from TeleSTAR of a complete cessation of hostilities in all forms. At the outset of the negotiations, MCI was not aware that TeleSTAR wanted to reserve the right to initiate antitrust litigation challenging MCI's successful advocacy in the FCC proceedings, but MCI's express desire for a complete cessation of hostilities at least implicitly covered TeleSTAR's release of any such claim. MCI explicitly requested such a release as soon as TeleSTAR made its intention clear"

In fact, TeleSTAR had not initiated

antitrust proceedings against either MCI or WTCI at the time. Antitrust complaints were filed almost a year later in United States District Court, Central District For The District Of Utah, in January of 1989 (No. 89-C-0068-S).

When TeleSTAR refused to grant MCI and WTCI private agreements for rescinding antitrust litigation the FCC-settlement negotiations were ended; a few months thereafter, the Commissioner found TeleSTAR guilty and denied its applications on the basis of evidence which previous to failed settlement negotiations they had found "insufficient" to convict.

Commissioners' Decision On MCI And WTCI

The case involving MCI's extensive FCC violations (1/ supra) had been determined earlier in January, 1988, prior to the FCC-sponsored settlement negotiations. MCI was found to have committed extensive FCC violations, but these "repeated" violations

were found "inadvertent" by Commissioners who ended up giving MCI a meaningless \$10,000 forfeiture. The Commissioners ignored MCI internal memos and statements of TeleSTAR witnesses that showed otherwise, including that of Steven Lance, a Chief County Building Inspector who observed respecting MCI's violations of not obtaining local building permits,

"MCI's failure to secure permits was a deliberate attempt to circumvent the law"

No evidentiary process was ever convened by the Commissioner to adduce evidence on illegal operations for which it had been cited and fined, but instead the Commissioners accepted every MCI representation on face value even when controvened by inexorable evidence to the contrary, such as MCI internal memos, PCNs from Comsearch, false certifications, false statements on STAs and 435 Applications, and testimony of disinterested-party witnesses

supplied by TeleSTAR, including local officials.

The case involving WTCI's violations was still pending at this time, the Commissioners seemed to go from vacillating between whether or not it would issue an order to cite WTCI for FCC violations; they finally decided to avoid any citations by disregarding the testimony of TeleSTAR's witness Marlin Herrick, who had been a WTCI subcontractor. This Commissioners' decision was rendered in November of 1988. Both these decisions are pending before the D.C. Circuit Court (MCI's cases are D.C. Circuit Nos. 88-1153 and 88-1419; WTCI's case is D.C. Circuit No. 88-1834).

The Commissioners Final Decision On TeleSTAR's Applications

On May 19, 1988 after failed FCC-sponsored settlement negotiations were terminated and TeleSTAR had filed for direct Appeal, dated April 22, 1988, the Commissioners pronounced TeleSTAR's

"Petition For Reconsideration" moot, but granted and considered it anyway and released their Memorandum Opinion and Order, FCC 88-171, denying TeleSTAR's applications.

This was even though the primary and ostensible reason for calling for the Commissioners' "Remand Hearings" had been addressed, since ALJ Miller admitted that TeleSTAR's witnesses had not exhibited any adverse "demeanor". This should have tipped the scales of justice; it did nothing.

Subcommittee Investigation

On August 9, 1988 The House of Representatives Subcommittee on Oversight and Investigations of the Energy and Commerce Committee empaneled investigations of the FCC regarding disparate treatment of petitioners as affecting the cases of TeleSTAR, MCI and WTCI (see Appendix 159). Several months thereafter General Accounting Office investigations of the FCC were called for (see Appendix 160).

Review Before The Court Of Appeals

TeleSTAR promptly sought review of its case before the D.C. Circuit Court. Oral argument was set for September, 1989. TeleSTAR argued that the Commissioners had ignored the fundamental question of whether it had been allocated the risk of nonpersuasion. In addition, TeleSTAR pointed to the disparate treatment of concurrently decided cases; that the "Final Order" was arbitrary and capricious, since finding a guilty verdict on the basis of same inconclusive evidence; that FCC-sponsored settlement was abusive of process and intended to extract antitrust immunity; and that in any case as the Bureau had repeatedly found, TeleSTAR carried the burden on nonpersuasion successfully showing it had not intentionally violated FCC regulations.

On September 22, 1989, the D.C. Circuit Court issued its denial of review for TeleSTAR's case (see Appendix 11).

REASONS FOR GRANTING THE WRIT

That review for TeleSTAR was cut off for failure to prosecute administrative remedies is "sacred-cow" protectionism disregarding the D.C. Circuit Court's standard for FCC treatment of concurrently decided case 6/; constitutional "equal protection" and "due process" rights 7/; and provides no oversight on out-of-control abuses such as the Commissioners' "Remand Hearing" in tandem with enactment of FCC-settlement negotiations unprecedented for a single applicant license. It represents no judicial review of an FCC showing itself in the "stagnant backwaters of caprice and lawlessness". 8/

6/ Concurrently decided cases; and "due process", Melody, at 831-2; Winthrow, 95 S.Ct 1464, Secretary Of Agriculture, 74 S.Ct 831; Amos Treats, at 263-4.

7/ ibid, and Joseph A. Califano v. Sanders 97 S.Ct 980, 986, 51 L.Ed.2d 192, 198 (1977)

8/ Heckler v. Chaney, (Justice Marshall, Dissenting, at 734) 105 S.Ct 1649, 470 U S 821, 84 L.Ed.2d 714 (1985)

It is submitted this is critical error warranting review, but as the case now stands, there also has been no determination whether the single element, which alone would support TeleSTAR's disqualification on an inconclusive record as to actual guilt, existed. It convicts on the basis of "insufficient evidence" 9/ those whom were repeatedly found "honest, credible and forthcoming witnesses telling the truth as best they were able". It puts this question squarely (which the D.C. Circuit Court left unanswered by the Commission) whether TeleSTAR had the burden of nonpersuasion

9/ The Commissioners themselves admit (and logically could do nothing else) in "Remand Order" that evidence was "insufficient" to grant or deny TeleSTAR's licenses, Steadman, 1001 S.Ct 1006 (disciplinary order must be supported by preponderance standard); this was even though the FCC Bureau consistently supported TeleSTAR's witnesses and evidence as conclusively innocent of charges of MCI and WTCI; the Commissioner refused to consider the anticompetitive motives, Lebanon Valley v. FCC, 503 F.2d 196, 200 (1974), cannot have myopic analysis of establishment radio station lurking in shadows to eliminate competition.

allocated, or even should have, simply because it was assigned the burden of proceeding with evidence. 10/

This simplistic technical excuse by the D.C. Court to provide judicial protectionism of recreant administrative processes flies in the face of reason and justice. It amounts to "burning draft cards" while the war rages outside, where an agency "monster" is running amuck with "administrative discretion", while special interests are being served by futile "Remanded Hearings" that "waste the government's and other parties' resources" and have been enacted not to adduce evidence but as punitive measures to force FCC-sponsored settlement by TeleSTAR to grant antitrust immunity to competitors, MCI and WTCI. In such instances the cutoff of judicial review was never intended by Congress or this Court, and

10/ "Shifting sands" of negating all elements for charges of serious wrong is critical to the outcome, the burden of proof decides case, Speiser, 78 S.Ct 1342.

sends a chilling alarm that no sustenance will be given to those who have stood in harms way simply because they favored "due process" and fairplay 11/, whether it be a TeleSTAR, a Gregory Vogt, a James O. Juntilla or a Frederick Fitzgerald.

Judicial oversight and review of administrative decisions should be denied on only rare exceptional occasions where a preponderance of evidence suggest it was congressional intent to do so. 12/ Failure to grant review on this case is against congressional intent and judicial precedent.

11/ Agencies can become "monsters" unless administrative discretion is checked by clear guidelines and review, Motor Vehicle, 103 S.Ct 2869; Baltimore, 89 S.Ct 283; Review by Court is essential to determine if mandate of congress is being followed, Atchison, Topeka & Santa Fe R Co. v. Wichita Board, 93 S.Ct 2367, 2374, 412 U S 800, 814, 37 L.Ed.2d 350, 357 (1973).

12/ Strong resumption of review cannot be cutoff, Clemon Barlow v. B.L. Collins, 90 S.Ct 832, 837, 397 U S 159, 164, 25 L.Ed.2d 192, 197 (1970); Bowen v. Michigan Academy, 106 S.Ct 2133, 2135, 476 U S 667, 669, 90 L.Ed.2d 623, 625 (1986).

The Commissioners "Remanded Hearings" were on face value a futile "waste of the government's and other parties' resources" as expressed to the Commissioners by competent FCC staff, Gregory Vogt, who informed the Commissioners that considerable government resources had been expended to complete TeleSTAR's hearing record in evidentiary processes that he termed "exhaustive proceedings".

It certainly did not escape the Commissioners attention that "Remand Hearings" were wasteful and inequitable 13/, they had not empaneled any evidentiary processes for either MCI or WTCI. In the

13/ In addition to Gregory Vogt imploring the Commissioners to consider the inequity of their order because TeleSTAR was in Chapter 11 Bankruptcy and would be unable to participate in "Remand Hearings" after having been financially drained by three-and-a-half years of FCC hearings, Board Member Blumenthal spent fully 1/3 of TeleSTAR's oral arguments exploring whether or not TeleSTAR applications would be moot because of its bankruptcy proceedings, even though the FCC had been fully apprised of the Bankruptcy Court proceedings.

case of MCI they were found to have committed extensive illegal construction operations over seven years on five separate networks across the country in addition to other illegal FCC operations such as illegal radio transmission and failure to complete FCC frequency coordination, which actually harmed other users unlike TeleSTAR's violation which caused no harm to anyone and for which no technical objection was evident either from the FCC or any user.

Yet, by comparison, these same Commissioners could muster no resources to investigate MCI's or WTCI's extensive violations, Canteen, 73 S.Ct 1028 (there must be fairness not antitrust in agency dealings), as more than twenty-year licensees, they were exonerated or they paid paltry fines after specious "closed-door-restricted proceedings" that carried no semblance of judicial temperament or of adducing any relevant facts. As such proceedings unfolded they became

evident as machinations to obscure evidence and offer implausible excuses for extensive violations by twenty-year licensees caught in multiple illegal operations for which they had provided no convincing explanation. What TeleSTAR was able to investigate regarding MCI's and WTCI's violations was miniscule as a company in Chapter 11 Bankruptcy with limited resources and available sources only public records. This was the only adversarial evidence of any kind relied upon by the Commissioners who sought rather to cover the evidence than adduce it regarding MCI's and WTCI's extensive FCC violations. They did not ever issue an order to show cause but held "closed-door-restricted" proceedings inconsistent with Citizens For Jazz On WRVR v. FCC, 775 F.2d 392, 397 (1985); the Commissioners here have been shown evidence of the existence of fire for twenty-year licensees caught in serious misrepresentations and pervasive FCC

violations, yet they have been excused with paltry forfeitures and incredible reading of the evidence.

Beyond the facts evident of the purpose intended to be served and was served by the "Remand Hearings", i.e., forcing TeleSTAR to the table with competitors and if that didn't work then cutoff of judicial review for failure to exhaust remedies, these proceedings should be intrinsically exposed. That the Commissioners' "Rehearing Order" was followed upon by nearly concurrent FCC-sponsored negotiations seems probative of abuses. These events were not in any sense unrelated, or perceived as such by those closely involved, as for instance, Gregory Vogt ("wasteful of the government's and other parties' resources and unlikely to produce any relevant evidence not already adduced") and even from so unlikely a source as ALJ Miller; he perceive "Remanded Hearings" were being used to force settlement (J.A. 1000),

"There have been rumblings of star-chamber settlement proceedings conducted before none other than the Commission's General Counsel".

That the "Remand Hearings" were placed into effect with FCC-sponsored settlement negotiation as nearly concurrent events is indicative facially they were intended to serve their purposes in tandem. The implications could not be otherwise, either TeleSTAR was being subjected to perverse abuses in being denied "due process" for extracting its property by force (giving antitrust immunity to competitors in exchange for FCC licenses or be faced with "Remanded Hearings") or the Commissioners were outbartering FCC licenses to one whom they found unfit. Chameleon changes were not wrought by TeleSTAR agreeing to meet in settlement negotiations with MCI, WTCI and the Commissioners' General counsel; this did not transform it from "bad FCC character" to "good". Neither were any evidentiary changes wrought, vis-a'-vis, FCC settlement

negotiations did not adduce further evidence to allow the Commissioners to see the light regarding TeleSTAR's innocence. It materializes as a sham, and a futile process aimed at abuses directed towards serving special interest groups by use of agency power. This brought the Subcommittee On Oversight and Investigations of the House of Representatives of the United States Congress for the Energy and Commerce Committee to become involved in these proceedings to investigate the FCC disparate treatment of this and related cases involving MCI and WTCI (see Appendix 159)

It was the Commissioners' appointed duty to extend due process and follow "fair trial with a fair tribunal", Amos Treat, at 263-4, Winthrow, 96 S.Ct 1464. From ALJ Miller, to Blumenthal and finally to the Commissioners themselves this was not the case. They are reminiscent of circling buzzards that drop down once in a while to see if the victim is dead, but if not they

propose unprecedented settlements. There wasn't a modicum of a fair tribunal at any juncture of FCC proceedings with exception of a few notable individuals who attempted to stop egregious anticompetitive processes during four years of such proceedings.

The Ninth Circuit has shown clearly different standards of what is requisite administrative remedies, White Mountain Apache Tribe v. Hodel ("White Mountain Apache"), 840 F.2d 675, 677-8 (1988), exhaustion of administrative remedies not required for judicial review when such remedies are futile because of; (1) a preannounced decision; (2) administrative bias; or when there is (3) harmful delay evident. TeleSTAR submits the record clearly indicates all three elements here in its case. This Court has set forth similar guidelines for review before exhaustion of remedies: When remedies are inadequate or futile Bill Honig v. John Doe, 108 S.Ct 592, 606, 98 L.Ed.2d 686 (1988); When reasonable

facts dictate otherwise, National Labor Relations Board v. Industrial Union Of Marine And Shipbuilding 88 S.Ct 1717, 1723, 391 U S 418, 424 (1968); When determined by the judicial discretion of the court, United States v. Abilene, Co. 44 S.Ct 565, 567 (1924); when irreparable harm would result, Eccles v. Peoples Bank, 68 S.Ct 641, 645 (1947).

CONCLUSION

For the reasons stated above, TeleSTAR respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals For the District of Columbia Circuit.

Respectfully submitted,

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NO. **89-1770**

Supreme Court, U.S.

FILED

FEB 26 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TeleSTAR, Inc.,

Petitioner;

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent;

**MCI COMMUNICATIONS CORPORATION,
WESTERN TELE-COMMUNICATIONS, INC.,**

Intervenors.

APPENDIX (VOLUME I)

**PETITION FOR WRIT OF CERIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

**DONALD F. BEACH
5881 Leesburg Pike
Suite 303
Falls Church, VA 22041
Telephone: (703) 931-5925
ATTORNEY FOR PETITIONER**

**DATE FILED: February 26, 1990
(CORRECTED COPY)**



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47 C.F.R. Section 21.3(b)

(b) Except when the Commission finds under the rules of this part that the public interest, convenience, or necessity would be served by waiver of this requirement, no radio license shall be issued for the operation of any station unless a permit for its construction has been granted by the Commission. No construction or modification of a station has been granted by the Commission. No construction of a station may be commenced without a construction permit, a modified construction permit, or other authority issued by the Commission for the exact construction or modification to be undertaken, except as may be specifically provided for in other sections of this part.

47 U.S.C. Sec. 309(e)

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question

of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any

hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate.

The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

47 U.S.C. 312(a)

Section 312. Administrative sanctions

(a) Revocation of station license or construction permit. The Commission may revoke any station license or construction permit--

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308[47 USCS Sec. 308]

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this ACT or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code [18 USCS Sec. 1304, 1343, or 1464]; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

5 USCS 556(d)

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent

consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title [5 USCS 557(d)] sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1420
September Term, 1989
Filed November 27, 1989

TeleSTAR, Inc.

Appellant

V.

Federal Communications Commission

Appellee

MCI Telecommunications Corporation
Western Tele-Communications, Inc.

Intervenors

and Consolidated Case No. 88-1445

BEFORE: Mikva, Edwards, and Ruth B.
Ginsburg, Circuit Judges

O R D E R

Upon consideration of Appellant's
Petition for Rehearing, filed November 6,
1989, it is

ORDERED, by the Court, that the
petition is denied.

PER CURIAM
FOR THE COURT:

CONSTANCE L. DUPRE',
CLERK

BY: Robert A. Bonner/s/
Robert A. Bonner
DEPUTY CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1420
September Term, 1989
Filed November 27, 1989

TeleSTAR, Inc.

Appellant

v.

Federal Communications Commission

Appellee

MCI Telecommunications Corporation
Western Tele-Communications, Inc.

Intervenors

and Consolidated Case No. 88-1445

BEFORE: Wald, Chief Judge; Mikva, Edwards,
Ruth B. Ginsburg, Silberman,
Buckley, Williams, D. H. Ginsburg
and Sentelle, Circuit Judges

O R D E R

Appellant's Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE',
CLERK

ROBERT A. BONNER/s/
Deputy Clerk

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 88-1420
September Term, 1989
Filed September 22, 1989**

**TeleSTAR, Inc.
Appellant**

v.

Federal Communications Commission

Appellee

**MCI Telecommunications Corporation
Western Tele-Communications, Inc.**

Intervenors

and Consolidated Case No. 88-1445

**Appeal from an Order of the
Federal Communications Commission**

**Before: MIKVA, EDWARDS, and ROHN B.
GINSBURG, Circuit Judges.**

J U D G M E N T

This appeal was considered on the record from the Federal Communications Commission and on the briefs and oral arguments of counsel. Upon full review, the court is satisfied that appropriate disposition of the case does not warrant a published opinion. See D.C. Cir. R. 14(c).

The Commission's remand order warned TeleSTAR that, as the record then stood, the FCC had "no basis to reverse the conclusion of both the ALJ and the Review Board that TeleSTAR is unquestionably to be a licensee." Despite that warning, and the reasonableness of the Commission's assignment of the proof burden to the applicant when "the operative facts are peculiarly within the knowledge of [that party]," TeleSTAR chose to stand on the existing record. Under the circumstances here presented, we have affirmed TeleSTAR's applications. It is therefore ORDERED AND ADJUDGED that the order from which this appeal has been taken be affirmed.

The Clerk is directed to withhold issuance of the rate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. R. 15(b)(2).

Per Curiam

FOR THE COURT:

Constance L. Dupre'

CONSTANCE L. DUPRE',

Clerk

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

CC DOCKET NO. 85-202

**In the Matter of
TeleSTAR, Inc.**

**Files Nos.
1743-CF-P-85
through
1757-CF-P-85**

**For Authority to Construct
New Common Carrier Point-to-
Point Microwave Radio Stations**

MEMORANDUM OPINION AND ORDER

**Adopted: May 11, 1988;
Released: May 19, 1988**

**By the Commission: Commissioner Dennis
concurring in the result.**

I. BACKGROUND

1. This proceeding involves 15 applications filed by TeleSTAR, Inc. for authority to construct common carrier microwave radio stations connecting Salt Lake City, Utah and Denver, Colorado. TeleSTAR constructed substantial parts of its proposed system without construction permits, thereby violating 47 C.F.R. Sec.

21.3. In pertinent part, section 21.3 provides that:

"No construction or modification of a station may be commenced without a construction permit, a modified construction permit, or other authority issued by the Commission for the exact construction or modification to be undertaken, except as may be specifically provided for in other sections of this part."

In an Initial Decision, ALJ Walter C. Miller denied TeleSTAR's applications, finding that TeleSTAR willfully violated section 21.3 and intentionally misrepresented material facts to the Commission about its premature construction. TeleSTAR, Inc., FCC 86D-30 (Apr. 18, 1986). The Review Board affirmed the ALJ's decision, concluding that TeleSTAR willfully violated section 21.3 and that "its principals made serious and numerous misrepresentations to the FCC, and displayed an egregious lack of candor in this

proceeding." TeleSTAR, Inc. 2 FCC Rcd 5.13
Sec. 24(1987).

2. On December 3, 1987. the Commission remanded this proceeding for further evidentiary hearings. TeleSTAR, Inc. (remand order), 2 FCC Rcd 7352 (1987). We said that any supplemental initial decision would be appealable directly to the Commission. 2 FCC Rcd at 7356 Sec. 27. On December 28, 1987, TeleSTAR filed a Petition for Leave to File Petition for Reconsideration, and a Petition for Reconsideration. Comments were filed January 12, 1988 by the Common Carrier Bureau: and a Response was filed January 13, 1988 by Western TeleCommunications, Inc. (WTCI).

3. On January 5 , 1988. Gregory J. Vogt. Chief of the Enforcement Division of the Common Carrier Bureau. requested the General Counsel to meet with the parties in this proceeding to consider the possibility of reaching a negotiated settlement. On

February 4, 1985, representatives of the Office of General Counsel met with the parties to explore the possibility of the parties negotiating a settlement. As a result of the February 4 meeting, the parties agreed to attempt to draft a memorandum of understanding concerning a settlement of this proceeding, and we deferred consideration of TeleSTAR's Petition for Reconsideration pending a further report from the parties. In a letter dated March 11, 1988, Mr. Vogt advised the General Counsel that there were "irreconcilable differences" among the parties and that the settlement negotiations "have broken down." We immediately resumed consideration of TeleSTAR's Petition for Reconsideration on an expedited basis, consistent with the priority of other matters and the efficient disposition of the Commission's business.

While TeleSTAR's Petition for Reconsideration was pending, the ALJ proceeded with the remanded proceeding. In TeleSTAR, Inc., FCC 88M-1113, issued April 13, 1988 and released April 15, 1988, the ALJ dismissed TeleSTAR's applications for failure to prosecute because of TeleSTAR's refusal to present evidence in the remanded hearing. On April 14, 1988, TeleSTAR filed an Urgent Request for Expedited Action asking the Commission to rule on its Petition for Reconsideration before the issuance of the ALJ's dismissal order. TeleSTAR's Urgent Request will be dismissed as moot because it was not filed until after the issuance of the dismissal order. On April 22, 1988, TeleSTAR filed an Appeal of the dismissal order.

5. TeleSTAR argues that in remanding this proceeding the Commission erred in its allocation of the burden of proof. TeleSTAR refused to present further evidence and it

urges the Commission to grant its applications and impose a monetary forfeiture. It asserts, however, that if the Commission is unable to find that TeleSTAR is qualified to be a licensee, the Commission should promptly deny TeleSTAR's applications, so that it can appeal the Commission's determination. In its Appeal of the dismissal order, TeleSTAR again argues that the record is complete and that the Commission erred in assigning the burden of proof and in remanding this proceeding.

II. DISCUSSION

A. The Remand Order

6. We do not lightly deny any application. In the remand order we found that are "conflicts and gaps. . . which makes it impossible to resolve this proceeding with sufficient certitude to determine whether we should grant or deny TeleSTAR's applications." 2 FCC Rcd at 7353 Sec. 10. It was, therefore, with an abundance of

caution, and because of the need for new, competitive common carrier service, that we remanded this proceeding for additional hearings to afford the parties an opportunity to fill in gaps in the record, and to allow TeleSTAR an opportunity to establish its qualifications. The ALJ was direct to take further evidence concerning: (1) how TeleSTAR's principals developed their incorrect understandings of the Commission's rules: (2) their involvement in the inconsistent and incorrect statements made to the Commission: and (3) when they became aware of the Commission's prohibition against premature construction. We anticipated that such evidence, if provided, could help determine TeleSTAR's qualifications.

7. Although we specifically found that TeleSTAR failed to establish its qualifications to be a licensee on the basis of their present record. TeleSTAR refused to

present further evidence. The Dismissal of TeleSTAR's applications moots its Petition for Reconsideration. However, in the interest of ensuring that TeleSTAR has a full opportunity to have its arguments reviewed by the Commission, we will grant the Petition for Leave to File Petition for Reconsideration. We will consider both the Petition for Reconsideration and the Appeal of the ALJ's dismissal order. We will reexamine the Board's Decision and resolve this proceeding, as TeleSTAR requests, on the basis of the current record. TeleSTAR's Petition for Reconsideration, the Application for Review, and the related pleadings listed in the remand order. 2 FCC Rcd at 7352 1.

8. We recognize that TeleSTAR provided affirmative evidence supporting its contentions. However, that evidence must be evaluated in light of circumstantial and other conflicting evidence in the record. When consideration is given to the full

record in this proceeding, the preponderance of the evidence establishes that TeleSTAR has both misrepresented material facts and exhibited a lack of candor in its prosecution of these applications. As set forth below, TeleSTAR failed to establish both that it is qualified to be licensee and that the public interest will be served by the grant of its application. *Steadman v. United States*, 450 U.S. 91, 100-02 (1981). Moreover, in light of TeleSTAR's failure to supplement the record, the ALJ properly dismissed its applications for failure to prosecute, providing a separate and distinct basis for denying TeleSTAR's applications.

B. TeleSTAR's Qualifications

9. TeleSTAR argues in both its Petition for Reconsideration and its Appeal that the Commission erred in holding that it had the burden of proof with respect to the factual issues. TeleSTAR argues that the ALJ failed to provide specific demeanor findings in

support of his candor conclusions: that its principals believed that TeleSTAR could begin constructing facilities immediately after completing the coordinating process for the frequencies to be used, without a specific Commission authorization: and that TeleSTAR acted in good faith because it did not start construction until after the completion of frequency coordination.

10. The Bureau argues that the ALJ failed to make adequate demeanor findings in support of his candor conclusions. It asserts that the Commission should review the record and make its own findings. The Bureau asserts that the record supports a conclusion that "somewhere along the way the principals adopted the mistaken impression that no preconstruction permit was required...[and that] it is highly plausible that the principals truly believed that no preconstruction approval was required." Bureau's February 24, 1987 Comments at 4-5.

The Bureau also argues that TeleSTAR's principals are "forthright, credible witnesses." Comments in Opposition for Reconsideration at 5. It urges the Commission to grant TeleSTAR's applications and impose a substantial forfeiture.

1. Burden of Proof

11. Before reaching the merits of TeleSTAR's contention, we must first address its objections concerning the allocation of the burden of proof. The remand order said that in the burden of proceeding with the production of evidence and the burden of proof are on TeleSTAR. TeleSTAR argues that the designated issues are predicated on allegations in a petition to deny, as they were in this case, the burdens of proof and proceeding are generally placed on the parties raising the allegations. D and E Broadcasting, 1 FCC 2d 78 (1965). It asserts that allocating the burden of proof to TeleSTAR is unfair.

because it would require TeleSTAR to "negative all possibilities of misconduct." Lamar Life Insurance Co., 5 FCC 2d 37, 40 (1966). TeleSTAR contends that we misread the hearing designation order, because it allocated the burden of proof to TeleSTAR only with respect to the conclusory issues, TeleSTAR., 50 Fed Reg. 27055 (July 1, 1985). 12. Although D and E held that the burden of proof is generally placed on "the party making the charges." it recognized "that there may be cases in which departure from this general practice may be justified." 1 FCC 2d at 80. In such cases, the Commission must explain its reasons for assigning the burden of proof to an applicant. Id. In the hearing designation order, the Bureau appended the following footnote to the ordering clause, requiring TeleSTAR to adduce evidence on all issues and assigning the burden of proof on the conclusory issues to TeleSTAR:

Where an applicant, against whom charges of misconduct have been raised, has within its peculiar knowledge the facts regarding the alleged misconduct, the applicant will have the burdens of production and proof on such issues. See generally, Granbury Communications Co., 68 F.C.C. 2d 966, 969(1978); Miami Broadcasting Corp., 11 F.C.C. 2d 920, 923(Rev. Bd. 1968). 50 Fed. Reg. at 20758 n.19. For reasons explained below, this footnote provided the required explanation for putting the burdens of proceeding and proof on TeleSTAR as to the issues for which the facts are peculiarly within its knowledge.

13. In this proceeding, the factual issues concern whether TeleSTAR's premature "construction was effectuated with the knowledge that the construction was in violation of Section 21.3" and whether TeleSTAR "Intentionally misrepresented material facts to the Commission." 50 Fed.

Reg. at 20758 16. The operative facts with respect to these issues are peculiarly within the knowledge of TeleSTAR's principals. Thus, TeleSTAR properly bears both the burden of proceeding and the burden of proof with respect to those issues.

14. Lamar Life, cited by TeleSTAR, does not require a contrary result. In Lamar Life the alleged misconduct involved "acts of omission" and the issue did "not concern matters that are peculiarly within the knowledge of the applicant and unknown or inaccessible to the complaints." 5 FCC 2d at 39 7. Although Lamar Life recognized that it would be unfair "to require an applicant to negative all possibilities of misconduct of a generalized sort," such is not the case here. The issues here concern affirmative acts - TeleSTAR's premature construction and its representations to the Commission. TeleSTAR's defense is that its principals were proceeding in good faith. The remand

order directed the ALJ to conduct further hearings to elicit evidence in order to clarify the differing and inconsistent arguments in TeleSTAR's pleadings concerning the premature construction: explain how its principals developed their erroneous understandings of the Commission's rules: and to supplement their testimony concerning their knowledge of the construction permit requirement. 2 FCC Rcd at 7354-56 14-26. Clearly, because the nature of these matters concerns facts within the peculiar knowledge of TeleSTAR's principals, it is not unfair or unreasonable to require TeleSTAR to present evidence concerning the activities of its principals or to carry the burden of proving that its principals were proceeding in good faith.

15. TeleSTAR argues that footnote 19 of the hearing designation order is not binding because it conflicts with the ordering clause: and that the Granbury Communications and Miami Broadcasting

proceedings, cited in the footnote, do not support allocating both the burden of proceeding and the burden of proof to the applicant. However, TeleSTAR's argument based on case law does not change the fundamental fact that the Communications Act itself, 47 U.S.C. 309(e), provides "that with respect to any issue presented by a petition to deny or a petition to enlarge issues, such burdens [of proceeding and of proof] shall be as determined by the Commission." The ordering clause specifically assigns the burden of proceeding on the factual issues and the burden of proof on the conclusory issued to TeleSTAR, 50 Fed. Reg. at 20758 17. Paragraph 17, however, is silent as to the burden of proof of the factual issues. That matter is addressed in footnote 19. Thus, nothing in footnote 19 is inconsistent with the remainder of the designation order. Moreover, in both the Granbury

Communications and Miami Broadcasting proceedings the burdens of proof on factual issues were allocated to the applicants. Granbury Communications, 68 FCC 2d at 969; Miami Broadcasting, 11 FCC 2d at 293. Thus, those proceedings fully support the allocation of the burden of proof with respect to the factual issues to TeleSTAR.

2. Representations Relating to TeleSTAR's Premature Construction

16. Representations in TeleSTAR's Applications: TeleSTAR began constructing its facilities in September 1984. In December 1984, TeleSTAR's outside counsel for communications matters sent TeleSTAR copies of Part 21 of the rules, putting TeleSTAR on constructive if not actual notice of the prohibition against premature construction. TeleSTAR Ex. 14. On January 4, 1985, TeleSTAR's president, Noel Stewart certified TeleSTAR's applications, attesting that he had reviewed the applications and that they were true and complete to the best

of his knowledge. The applications falsely represented that "TeleSTAR proposes to construct" its facilities. Nothing in the applications even intimated that TeleSTAR had already started construction. TeleSTAR's principals did not object to the representation concerning its intent to construct, nor did they advise their FCC counsel that TeleSTAR had already started construction. Tr. at 442-44.681. Noel Stewart testified that the application was prepared by outside counsel for communications matters, that he had not seen all of the exhibits when he signed the applications, and that he did not know if he "had even seen this particular part" of the application. Tr. at 44-2-43. TeleSTAR's counsel was not aware of the construction until after the applications were filed, TeleSTAR Ex. 3.

17. Noel Stewart also certified that TeleSTAR had a copy of Part 21 and that he

was "familiar with all rules affecting the proposed operation." Application Q, 33.

However, TeleSTAR later disavowed the statements in the applications, asserting that Noel Stewart did not have an adequate opportunity to read the rules. TeleSTAR's Motion for Summary Decision at 2 (filed Sept. 30, 1985). Noel Stewart later testified that he "had a short time to review the Rules" and that he could "not recall reading" section 21.3 or any other information indicating that there is a prohibition against construction without a permit, TeleSTAR Ex. at 12: Tr. at 338.

18. Conflicting Arguments and Representations in TeleSTAR's Pleadings: TeleSTAR advanced one explanation for its premature construction and then it abandoned that explanation for a conflicting explanation when it became apparent that its initial contentions were inconsistent with the facts. Thus, on March 21, 1985, TeleSTAR filed an Opposition to Petition to Dismiss

its Applications, arguing that section 21.3 "is very amenable to misinterpretation" and that it understood section 21.3 of the rules to prohibit only the "installation and connection of hertzian wave propagation equipment." TeleSTAR EX. 1, Attachment K at 30-31. The Board found that TeleSTAR's explanation was not credible because its construction in fact included antennas and waveguides, which are "hertzian wave propagation equipment." 2 FCC Rcd at 6 7.

19. TeleSTAR abandoned the argument made in its March 21 Opposition in the subsequent Motion for Summary Decision filed September 20, 1985. TeleSTAR attributed the previous argument - that it misunderstood the Commission's rules - to its outside counsel for communications matters. Counsel testified that he drafted the pleading without ever attempting to determine if the Stewarts had read the rules Tr. at 849-50. TeleSTAR argued in the September 20 motion, for the first time, that Noel Stewart was

not "aware of or had ever seen" section 21.3 before it started construction, Motion for Summary Decision at 2. Noel Stewart certified that the March 21 opposition was prepared under his supervision and that the facts contained in the opposition were true. TeleSTAR Ex. 1 Attachment K at 85, Noel Stewart explained the change, asserting that the opposition was prepared by TeleSTAR's communications counsel, that Stewart did not read it until after it was served, and that after reading the opposition "nothing bothered" him. Tr. at 346. It is clear, however, that the representations concerning Noel Stewart's knowledge of the rules -- in the application and the March 21 opposition, and in the September 20 motion -- are patently inconsistent, and that at least one of the documents contained representations which are false.

20. TeleSTAR erroneously argues that the remand order accepted TeleSTAR's

contention that its principals did not become aware of the prohibition against premature construction during the course of their review of Part 21 before the certification of TeleSTAR's applications. The remand order merely recited the showing "that TeleSTAR's certification practices were sloppy and ill-advised" and concluded that those particular matters "standing alone do not warrant denial of its applications." 2 FCC Rcd at 7354 13. That conclusion, however, does not alter the fact that TeleSTAR submitted patently false information in either its pleadings or its applications, and that the false statements were the direct result of Noel Stewart's deficient certification practices. Noel Stewart's carelessness raises questions about the Commission's ability to rely on TeleSTAR's representations in the future and, when considered in the light of the full record in this proceeding, it must be considered as part of the evidence

reflecting adversely on TeleSTAR's qualifications to be a licensee. We reiterate that our remand order gave TeleSTAR the opportunity to submit additional, mitigating evidence: but TeleSTAR chose not to do so.

21. Documents Drafted by TeleSTAR's Principals: Noel Stewart and his brother, Doyal Stewart, who is Chairman of TeleSTAR, testified that they believed TeleSTAR could begin construction after the completion of the frequency coordination process even if TeleSTAR had not yet received a written authorization from the Commission. Tr. at 327-29, 528-31. However, this testimony is inconsistent with statements contained in documents drafted by the Stewarts and distributed to TeleSTAR's shareholders.

22. TeleSTAR issued a Private Placement Memorandum (PPM) dated January 16, 1984 to explain its proposed operations to prospective investors. Doyal Stewart drafted

the section of the PPM relating to site construction, which states that:

"Construction of the sites will begin upon a preclearance release from the FCC for construction to begin. This order is obtainable from the FCC usually after frequencies have been out on 'user notification'." Tr. at 518-20: TeleSTAR Ex. 1 Attachment E at 31. Doyal Stewart also drafted a flow chart as part of the PPM which indicated that TeleSTAR would get "FCC Pre-Build Orders" before constructing facilities. Tr. at 518-20: TeleSTAR Ex. 1. Attachment E at 64. Although the PPM used different terminology than the Commission's rules, it conveyed a clear message that Commission authorization was required before TeleSTAR could start building its facilities.

23. TeleSTAR's awareness of a need for a construction permit was also shown by other contemporaneous documents. On April

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17, 1984, Noel Stewart wrote to TeleSTAR's shareholders that the Commission's processes had been changed and that "the FCC now requires only that a Construction Permit (CP) be obtained and that applications have been filed for frequency licenses." TeleSTAR Ex. 1, Attachment G at 3(emphasis added). In a letter dated June 7, 1984, Noel Stewart discussed the chronological sequence of the steps to be taken by TeleSTAR. He wrote that:

The events ahead are: (1) Prior coordination (User Notification).(2) construction acquisitions and preparations. (3) site acquisition and formal leases on privately owned sites. (4) implementation of Phase II construction (low cost items and prefabrications). (5) finalization of User Notification coordination. (6) FCC granting of CP and final constructions. TeleSTAR Ex. 1, Attachment H at 7 (emphasis added). The letter continued:

Some preliminary constructions of towers and other items will soon be underway. After the 30-day User Coordination is over--anticipated time-frame is mid July--some private sites will be obtained and the construction phase will begin on certain sites. Upon finalization of public notification and granting of CP by the FCC the FCC the construction process will be well underway. Tower and shelter designs are being completed now in preparation for the construction phase.

Id. Although this letter recognized the need for a construction permit, it advised investors that TeleSTAR intended to start construction before obtaining FCC permits.

24. In a letter dated July 14, 1984, TeleSTAR advised its shareholders that the frequency coordination process was nearing completion and that it was hoping to complete substantial construction before

receiving a permit. It advised investors that:

After prior coordination, as previously mentioned, a 435 Form will be filed with the FCC for an FCC construction permit (CP). The FCC CP will usually be granted after an additional 30-day public notice by the FCC.

Hopefully, before receiving the FCC CP, most of the private sites will be constructed which will leave 2 - 3 remaining sites to be completed during September after receiving the FCC CP, TeleSTAR Ex. 1, Attachment I at 4.

25. The PPM and letters to TeleSTAR's shareholders contradict TeleSTAR's representations discussed in paragraphs 18 and 19, above, and they establish that TeleSTAR knew that it needed a construction permit. The letters showed that TeleSTAR intended to construct its facilities before it received a permit from the Commission. TeleSTAR argues that this admission

establishes its good faith because it would not have knowingly admitted its intention to construct facilities in violation of section 21.3. TeleSTAR had provided no basis for determining a notice for these statements. The remand order specifically advised TeleSTAR that we could not exonerate it on the basis of these statements without further information 2 FCC Rcd at 7355 19. TeleSTAR did not present such evidence on remand.

26. Moreover, TeleSTAR amended the PPM at the insistence of prospective investors, to include an agreement for the dissolution and liquidation of the company if it was unable to commence operations by January 1, 1985. FCC 86D-30 at 14,. The ALJ found that TeleSTAR started construction without a permit in order to meet its commitment to start operations by January 1, 1985. FCC 86D-30 at 25. Although we do not conclude that TeleSTAR's statements in the letters to

its shareholders were motivated by its desire to placate anxious investors, the record, standing alone, does not warrant inference of good faith predicated on TeleSTAR's statements in those letters.

Because TeleSTAR has not otherwise explained its reference to the need for a construction permit in the PPM and letters and because those documents show that it was aware of the construction permit requirement, these matters also establish that TeleSTAR is not qualified to be a Commission licensee.

27. The Stewarts' Erroneous

Understanding of the Commission's CP

Requirement: The burden of proof is on

TeleSTAR to establish its qualifications. In

light of the significant evidence reflected

in TeleSTAR's documents referring to

"pre-build orders" and construction permits.

TeleSTAR had to present persuasive evidence

establishing a genuine good faith belief

that it could construct without a permit.

Noel Stewart testified: "Based on

information available to us and our impressions, I believed . . . that FCC approval was necessary before radio equipment was installed or operated, but that it was not necessary before site construction began." TeleSTAR Ex. 1 at 5. Both Stewarts testified that after discussions with equipment suppliers and industry representatives they came away with the impression that they did not need a construction permit before starting construction. TeleSTAR Ex. 1 at 5-7; Tr. at 524. However, TeleSTAR presented no disinterested witness to corroborate this testimony. Moreover, they admitted that they did not consult with outside communications counsel about when they could start construction Tr. at 536. Noel Stewart also admitted that no one ever told him that he did not need a construction permit to start construction of TeleSTAR's system. Tr. 465-66.

28. The remand order found that TeleSTAR had failed to establish how the Stewarts developed their erroneous interpretation of the rules. 2 FCC Rcd at 7355 21. We said that without further evidence to show that the erroneous interpretation in fact resulted from a confusion about the rules, we could not find TeleSTAR qualified to be a licensee. Id. at 7355 23. The remand order specifically afforded TeleSTAR's principals an opportunity to testify about the specific nature of their conversations with industry representatives and to present those representatives as witnesses. Id. at 7355 20-23. In this regard, we find it hard to believe that the Stewarts would have solicited investments, made representations and expended funds based on "impressions" without first checking to ensure that those representations were accurate. TeleSTAR, nonetheless, has declined to present such pertinent evidence.

29. In any event, the limited evidence that TeleSTAR did present as to its industry contacts establishes, if anything, that the Stewarts were not misled by industry contacts. In an affidavit submitted by TeleSTAR, Edsel Davis of Spectrum Planning, Inc. stated: "I know that I would not have said construction without an FCC permit was permissible." Motion for Summary Decision. Ex. 7: Tr. at 545-46.

30. Similarly, we are unable to make any exculpatory inferences from the testimony of J. Craig Carmen, TeleSTAR's local corporate attorney, who investigated whether TeleSTAR's principals had prior knowledge of the rules. Carmen concluded that: (1) the Stewarts were aware of the need for a construction permit when they drafted the PPM; (2) after subsequently meeting with representatives of Spectrum Planning, they believed that TeleSTAR could start construction after receiving a

"Preliminary Clearance Notification" (PCN); and (3) TeleSTAR did not start construction until it received clearance from Compucon, Inc. TeleSTAR Ex. 1, Attachment V. Carmen referred to statements by Noel Stewart that he believed a "Preclearance construction order" was required when TeleSTAR issued the PPM, but that discussions with consulting contractors from Spectrum Planning and Compucon caused Noel Stewart to believe that TeleSTAR could start preliminary construction without a Commission authorization, Tr. at 273-77. Carmen testified, however, that Stewart could not point to any specific conversation where industry representatives told him that the construction was permitted, and that representatives of Spectrum Planning and Compucon had told Carmen that they would not have advised TeleSTAR that it could begin construction without a construction permit. Tr. at 263-65, 276, 288. The record does not

include any other specific evidence concerning the nature of the conversations which these representatives had had with the Stewarts. In view of the limited evidence in the record, we can give no credence to the Stewarts' self-serving and otherwise unsupported testimony that they gained their erroneous understandings of the rules from their contracts with industry representatives.

31. Doyal Stewart's specific explanation of why he thought construction was permissible further strains credulity. He testified that he "never thought that that they [the FCC] would be concerned with the actual construction permit . . . [he] would be getting from the city and county wherever we were building." Tr. at 533 (emphasis added). This statement is inconsistent with the portion of the PPM written by Doyal Stewart that clearly said that a "pre-build order" from the Commission

was a prerequisite for construction. The above testimony, when compared with the precise language of the PPM prepared by Doyal Stewart, is a further indication of TeleSTAR's lack of candor in its representation to the Commission.

32. Representations Concerning When TeleSTAR Discovered That Its Construction Violated the Rules: TeleSTAR maintains that it did not know that its pre-construction was prohibited until it was told by David Irwin, its counsel for FCC matters, and that it ordered the construction stopped after consulting with Irwin. TeleSTAR Ex. 1 at 14. It is undisputed that work on the construction was completely shut down by January 25, 1985. TeleSTAR Exs. 16, 17, 18. What is disputed is whether the conversation with Irwin occurred before or after this date. TeleSTAR's witnesses claimed that on January 23, 1985, Steve Amundsen (TeleSTAR's director of marketing) was advised by a representative from Compucon that WTCI was

inquiring about the premature construction. Amundsen testified that he immediately called Irwin, who told him that TeleSTAR should stop construction; that he discussed the Irwin call with the Stewarts; and that TeleSTAR ordered construction stopped. TeleSTAR Ex. 1 at 13-14; TeleSTAR Ex. 2 at 6; Tr. at 331, 596-98. Irwin, however, testified that he did not learn about the premature construction until January 29 - that is, four days after TeleSTAR had stopped construction Tr. at 694.

33. TeleSTAR argues that its principals' testimony is corroborated by telephone and billing records, TeleSTAR Exs. 2, 9. These records indicate that on January 23 and 29 the following calls - by TeleSTAR to Compucon or Irwin & Lesse or Carmen, or by Compucon or Irwin & Lesse to TeleSTAR -

were made at the following (Mountain Daylight) times:

January 23

Time	Duration
8:18 a.m.	3 min. to Compucon
11:48 a.m.	10.9 min. from Compucon
12:53 p.m.	6.1 min. from Compucon
1:16 p.m.	7 min. to Irwin & Lesse
1:34 p.m.	4 min. to Irwin & Lesse
1:55 p.m.	4 min. to Compucon
2:53 p.m.	6 min. to Craig Carmen

January 29

Time	Duration
7:55 a.m.	4 min. from Irwin & Lesse
8:16 a.m.	2 min. to Irwin & Lesse
8:32 a.m.	14 min. to Compucon
8:47 a.m.	1 min. to Compucon
8:50 a.m.	4 min. from Irwin & Lesse

TeleSTAR Ex. 9 TeleSTAR also asserts that Bureau counsel found that its principals testified truthfully about the date on which they first became aware of the prohibition against premature construction.

34. This evidence is inconclusive and therefore not exculpatory. The telephone records show only that calls were made on both days. Those records would be consistent

with a finding that Irwin had told Amundsen that the construction was prohibited on either day. Irwin testified that he could not have been notified about the construction on January 23, because the call from Amundsen was overheard by Frank Inserra (an associate) and because he also immediately discussed the call with Sylvia Lesse (his partner), and neither Inserra nor Lesse was in the office on January 23, Tr. at 694, 716-17, 900-01.

35. Based on the evidence in the record, we affirm the findings of the ALJ that TeleSTAR's principals lacked candor by testifying that they were unaware of the prohibition against premature construction until notified on January 23 by Irwin. The telephone records cited by TeleSTAR are, as noted above, inconclusive. Even the Bureau, which urges the Commission to accept the Stewarts' testimony, recognized that the telephone records are inadequate to

determine when TeleSTAR discussed the premature construction with Irwin. Bureau's Proposed Findings filed December 20, 1985, at 14 37. TeleSTAR spent more time on phone calls on January 23 than on January 29. On January 23, however, TeleSTAR filed its applications, and this could explain the difference.

36. We note, further, that the testimony of TeleSTAR's principals is also in conflict with a predesignation pleading filed by TeleSTAR. In a Response to Request for Rejection of Applications, filed February 11, 1985 (TeleSTAR Ex. 1, Attachment S), TeleSTAR represented that Amundsen did not become aware of the inquiries about the premature construction until January 24 and that he did not call Irwin until January 29 - the same date that Irwin testified he received the call.

37. We also find that Irwin's testimony is simply more credible on the

issue of when the call was made. Whereas TeleSTAR's telephone records do not indicate the subject matter discussed, Irwin's contemporaneous billing slip indicated that on January 29 he had discussions concerning the premature construction, TeleSTAR Ex. 12. The billing slip for January 23 includes no similar notation. More importantly, Irwin presented clear explanation of why he believed the call was made on January 29 instead of January 23. In contrast, Amundsen's direct testimony initially placed the call on January 24 (TeleSTAR Ex. 2 at 6) and his explanation of why he changed his testimony to January 23 is unconvincing. Although Amundsen testified that he consulted telephone logs, he did not explain why those logs convinced him that January 23 was correct, nor did he otherwise provide any corroboration for his changed testimony, Tr. at 596-97. Similarly, Noel Stewart's direct testimony placed the telephone conversation during which Irwin advised

TeleSTAR to stop construction "around the last of January"; moreover, he did not adequately document or explain why he subsequently changed his testimony to claim that the critical Irwin call was made on January, TeleSTAR Ex. 1 at 13: Tr. at 329-32.

38. TeleSTAR also had reason to be less than candid about the date when Irwin told TeleSTAR that construction without a permit was improper. TeleSTAR argued throughout this proceeding that it had been unaware of the construction permit requirements. However, it is undisputed that construction on TeleSTAR's proposed facilities was halted by January 25. Given this fact, it was imperative for TeleSTAR to claim that the premature construction conversation with Irwin occurred on January 23. Otherwise, an inference could be drawn that the construction was halted as soon as inquiries were made because TeleSTAR's

principals already knew that the construction was improper and that it could not be justified.

39. The remand order found a lack of evidence explaining how or why TeleSTAR's principals concluded that the discussion concerning premature construction occurred on January 23. We remanded this proceeding to adduce further evidence concerning when Irwin advised TeleSTAR that the construction was prohibited. 2 FCC Rcd at 7356 26. As previously discussed, the telephone records do not support the testimony of TeleSTAR's principals, and TeleSTAR has failed to supplement its initial showing. Thus, the available record evidence established that TeleSTAR's principals lacked candor in their testimony concerning when they became aware of the prohibition against premature construction.

40. The Bureau's Pleadings: The Common Carrier Bureau argues that the Stewarts and

Amundsen were "forthcoming, credible witnesses." Comments filed January 12, 1988, at 12. It accepted their testimony that Irwin told them open January 23 that the construction was prohibited. The Bureau argues that TeleSTAR would not have stopped the work on its facilities without being advised to do so by Irwin. Proposed Findings filed December 20, 1985 at 14 38.

41. On January 23, 1985, TeleSTAR became aware of WTCI's inquiries about its premature construction. It is plausible that TeleSTAR stopped construction in response to these inquiries. The Bureau admitted that it was "at a loss" to explain the credible testimony of Irwin. Lesse and Inserra is also supported by TeleSTAR pleadings and contemporaneous billing slips. On the other hand, the claim that TeleSTAR's principals were unaware of the construction permit requirement is inconsistent with the PPM and the letters to TeleSTAR's shareholders. In view of the gaps in the record, the contrary

evidence, and the failure of TeleSTAR to present explanatory, exculpatory evidence, we cannot find that TeleSTAR's witnesses were candid in their testimony.

42. TeleSTAR's Premature Construction: The parties have stipulated and the record supports the finding that TeleSTAR constructed facilities without a construction permit in violation of 47 C.F.R. 21.3.

43. The ALJ's Demeanor Findings: The remand order found that the ALJ's credibility conclusions were not supported by specific demeanor finding. 2 FCC Rcd at 7353 11. An ALJ's credibility rulings "should be supported by some specification in order to be accorded significant weight." Gulf Coast Communication, Inc. 81 FCC 2d 499, 506 (Rev. Bd. 1980), recon. denied. FCC 82-128 (Apr. 16, 1982). Where an ALJ fails to provide a detailed demeanor analysis, we can make our own findings based on the

record evidence, Id. 81 FCC 2d 306. We have not relied on the ALJ's decision or findings in this proceeding. In order to ensure that the record fully supports the denial of TeleSTAR's application, we have reviewed the testimony and exhibits and made our own determinations on the disputed issues.

44. The Dismissal of TeleSTAR's Applications: The remand order afforded TeleSTAR a further opportunity to establish its qualifications to be a licensee. The order listed specific deficiencies in TeleSTAR's showing, where further information -- if submitted -- could help establish TeleSTAR's qualifications. The ALJ was directed to conduct further hearings to elicit evidence concerning the record deficiencies. TeleSTAR's argument that the record is complete is without merit. For example, the Stewarts testified that they developed a misunderstanding of the Commission's rules after conversations with

industry representatives. TeleSTAR, however, never described the conversations and it failed to present the industry representatives as witnesses to bolster the Stewarts' self-serving, unsupported testimony. Its explanations concerning the drafting of documents and of when it allegedly became aware of section 21.3 are also unconvincing. TeleSTAR's refusal to exchange witnesses or exhibits and its decision to rest on the existing record is fully justified. TeleSTAR's dismissal of its applications for failure to prosecute and stands as a separate and distinct basis for the denial of its applications. At a minimum, TeleSTAR should have called as witnesses its primary contacts and it could have presented its principals as witnesses so that the court could further examine on the matters raised in the remand order. We will, therefore, deny TeleSTAR's appeal and affirm the ALJ's dismissal of its applications.

3. Conclusions Regarding TeleSTAR's Basic Qualifications

45. The only substantial evidence supporting TeleSTAR's version of the facts is the unsupported, self-serving, and at times self-contradictory testimony of its principals. Although TeleSTAR had the burden of establishing its qualifications, it did not present documentary or other supporting evidence that would corroborate or otherwise demonstrate the credibility of its witnesses.

46. In remanding this proceeding, we listed specific gaps and inconsistencies in the record, and we stated why we were unable to find TeleSTAR qualified to be a licensee. TeleSTAR declined to provide additional evidence for the record. In view of the conflicts between the testimony of TeleSTAR's witnesses and the other evidence, we find that the record fully supports the findings of the ALJ and the Board that the preponderance of the circumstantial,

documentary and other evidence establishes that TeleSTAR has misrepresented material facts and exhibited lack of candor in its prosecution of the applications. Consequently, we do not conclude that TeleSTAR is basically qualified to be a licensee and that grant of its applications would serve the public interest.

47. If this is merely a case of premature construction, a lesser penalty such as a monetary forfeiture might be appropriate. For example, in *Eagle Telecommunications*, 3 RR 2d 1243(1985), recon. denied, 3 RR 2d 1249(1986), we imposed a forfeiture of \$20,000 for the unauthorized construction and operation of cable television facilities by a telephone carrier. However, in addition to the violations of section 21.3 there are TeleSTAR's misrepresentations and lack of candor, and its failure to prosecute its applications in the demanded proceeding.

48. In Policy Regarding Character Qualifications in Broadcast Licensing. 101 FCC 2d 1179. 1211 (1986), we stated that it is "necessary and appropriate to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees." The policies relevant to an applicants' character in the broadcast context differ from those in the common carrier context. Id. at 1202 n.52. But those differences are not pertinent here because the character issues raised involve TeleSTAR's relationship to the Commission and the integrity of the Commission's processes, not TeleSTAR's status as a common carrier. Lack of candor and misrepresentation are sufficient grounds for the adverse action here. Password, Inc., 76 FCC 2d 465, 519 121 (1960), recon. denied.

86 FCC 2d 437, 441 10 (1981); Superior Communications Co., 57 FCC 2d 772, 776 19 (1976).

49. As set out above, we have closely examined the record in this proceeding. Based on that record, it is clear that TeleSTAR violated the rules by its premature construction. TeleSTAR also submitted patently false information as a result of Noel Stewart's deficient certification practices. It also made misrepresentations of material facts and exhibited a lack of candor: (1) in its applications which falsely represented that TeleSTAR proposed to construct its facilities, (2) in its pleadings filed March 21 and September 20, 1985, which contained inconsistent and contradictory explanations for its premature construction, and (3) in its principals' self-serving testimony concerning their understanding and knowledge of the Commission's construction permit requirement, which was unsubstantiated and

rebutted by the other record evidence. The record, therefore, requires us to conclude that TeleSTAR is not qualified to be a licensee. We further find that TeleSTAR failed to prosecute its applications in the remanded proceeding, that its applications were properly dismissed by the ALJ and that its failure to prosecute is a separate and independent-ground for the denial of its applications for new microwave radio stations.

III. ORDERS

50. ACCORDINGLY, IT IS ORDERED, that the Petition for Leave to File Petition for Reconsideration filed December 28, 1987 by TeleSTAR, Inc. is GRANTED.

51. It is further ordered, That the Petition for Reconsideration filed December 28, 1987 by TeleSTAR, Inc. IS GRANTED to the extent indicated herein and in all other respects IS DENIED.

52. IT IS FURTHER ORDERED, That the Application for Review filed February 9,

1987 by TeleSTAR, Inc, IS GRANTED to the extend indicated herein and in all other respects IS DENIED.

53. IT IS FURTHER ORDERED, That the Urgent Request for Expedited Action, filed April 14, 1988 by TeleSTAR, Inc. IS DISMISSED.

54. IT IS FURTHER ORDERED, That the Appeal filed April 22, 1988 by TeleSTAR, Inc., IS DENIED.

55. IT IS FURTHER ORDERED, That the applications for authority to construct new Common Carrier point-to-point microwave radio stations filed by TeleSTAR, Inc. (File Nos. 1743 CF-P-85 through 1757 CF-P-85) ARE DENIED and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS
COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTE

No. 1 Also before the Commission are Comments filed by the Common Carrier Bureau and an Opposition filed by Western Tele-Communications Inc. on May 9, 1988. These pleadings were not considered in our determination to deny TeleSTAR's appeal.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 88M-1113
3083

In the Matter of	)	CC DOCKET NO. 85-202
TeleSTAR, Inc.	)	File No. 1743-CF-P-85
	)	through 1757-CF-P-85
)	
For Authority to)	
Construct Common)	
Carrier Point-to-)	
Point Microwave)	
Radio Stations)	

MEMORANDUM OPINION AND ORDER

Issued: April 13, 1988;
Released: April 15, 1988

1. We held a further prehearing conference on April 13, 1988. There the Presiding Officer ruled that:

"TeleSTAR Inc.'s fifteen applications (File Nos. 1743-CF-P-85 through 1757-CF-P-85) for authority to construct new common carrier point-to-point microwave stations between Salt Lake City, Utah and Denver, Colorado, ARE DISMISSED with prejudice for failure to prosecute."
This Order CONFIRMS that ruling. A brief explanation follows:

Explanation

2. The Commission remanded this case on December 3, 1987 (FCC 87-384). They ordered TeleSTAR, the bearer of the burden of proceeding and the burden of proof on the specified issues, to present more evidence on four specific topics. They also called on the Judge to conduct an expedited hearing, and issued a Supplemental Initial Decision.

3. In remanding, the Commission expressed their concern with a record filled with gaps, inconsistencies, and numerous unanswered questions. The Presiding Officer responded procedurally to those concerns. He immediately issued two prehearing orders.

4. In the first prehearing order, the Presiding Officer called a further prehearing conference for April 6, 1988, ordered TeleSTAR to exchange their further evidence and a list of witnesses on that date, set an evidentiary admission session for April 19, 1988, scheduled the remanded

hearing to begin on May 2, 1988, and blocked off five days for that remanded hearing (FCC 87M-3240, released December 10, 1987).

5. A short time later, and after studying the Commission's remand order further, the Trial Judge became convinced that it would take more than five hearing days to try the expedited proceeding so he issued a second prehearing order (FCC 87M-3298), released December 17, 1988). There he increased the number of scheduled hearing days from five to thirteen and explained why.

6. TeleSTAR then sought reconsideration of the Commission's remand order on December 28, 1987. In essence they called on the Commission to quit straddling the fence. They argued that everyone in the case believed that sufficient evidence had been adduced to support a decision one way or another, and urged the Commission to

section of the PPM relating to site construction, which states that: construction of the sites will begin upon a clearance release from the FCC for construction to begin. This order is obtainable from the FCC usually after agencies have been out on 'user notification'." Tr. at 518-20: TeleSTAR Ex. Attachment E at 31. Doyal Stewart also created a flow chart as part of the PPM which indicated that TeleSTAR would get "FCC Build Orders" before constructing facilities. Tr. at 518-20: TeleSTAR Ex. 1. Attachment E at 64. Although the PPM used different terminology than the Commission's, it conveyed a clear message that Commission authorization was required before TeleSTAR could start building its facilities.

23. TeleSTAR's awareness of a need for construction permit was also shown by contemporaneous documents. On April

reflecting adversely on TeleSTAR's qualifications to be a licensee. We reiterate that our remand order gave TeleSTAR the opportunity to submit additional, mitigating evidence: but TeleSTAR chose not to do so.

21. Documents Drafted by TeleSTAR
Principals: Noel Stewart and his brother Doyal Stewart, who is Chairman of TeleSTAR, testified that they believed TeleSTAR to begin construction after the completion of the frequency coordination process even though TeleSTAR had not yet received a written authorization from the Commission. Tr. 327-29, 528-31. However, this testimony is inconsistent with statements contained in documents drafted by the Stewarts and distributed to TeleSTAR's shareholders.

22. TeleSTAR issued a Private Placement Memorandum (PPM) dated January 1984 to explain its proposed operations to prospective investors. Doyal Stewart d

either grant or deny TeleSTAR's applications.

7. Two days later, TeleSTAR filed their remanded Notice of Appearance. They told the Trial Judge that they weren't going to present any further evidence, that their "... present intention under such circumstances would be to decline the invitation to present further evidence and to rest on the record already made, treating the Commission's remand order as in effect a final adverse action."

8. This stated intention left the Trial Judge in a dilemma. The Commission had ordered him to expeditiously take further evidence; he, in turn, had directed TeleSTAR to exchange that evidence on April 6, 1988; but TeleSTAR said they didn't intend to do so, and continued to press for Commission reconsideration.

9. Moreover, the Trial Judge was also aware that no one had asked the

Commission to stay the April 6th prehearing conference date. So he issued still another Order (FCC 88M-731 released March 15, 1988). There he delineated his problem. And he stated that he couldn't, and wouldn't view the Commission's remand order as "merely an invitation to present further evidence."

10. The Trial Judge then said he would address his dilemma by doing two things. First, he gave TeleSTAR an extra week (from April 6th to April 13th) to search out, prepare and submit the evidence the Commission wants, in case they (TeleSTAR) had a change of heart.

11. Secondly, he told TeleSTAR that if TeleSTAR failed to make their evidentiary exchange on April 13, 1988, and if the Commission hadn't stayed the proceeding before that time, he would dismiss TeleSTAR's applications for failure to prosecute. 1

1 The Presiding Officer was well aware that by releasing his Order on

March 15, 1988, he was giving any party to the proceeding more than ample time to ask the Commission to stay the remanded procedural dates. In fact some might view the March 15th order as an invitation to request a stay.

12. When we met on April 13, 1988, the Trial Judge first asked TeleSTAR whether it was prepared to exchange the evidence the Commission had ordered taken. TeleSTAR said no, that it would stick with its original intention, that it had no evidence to submit. The Presiding Officer then confirmed that none of the parties to the proceeding had asked to stay the proceeding. So he carried out his March 15, 1988 pledge: he dismissed TeleSTAR's applications. 2

13. TeleSTAR has deliberately defaulted; so dismissal of their applications is mandated. 3

Further Ruling

Having dismissed TeleSTAR's point-to-point micorwave station applications, there is no need to take any evidence.

SO the evidentiary record IS RECLOSED, and this proceeding IS TERMINATED

FEDERAL COMMUNICATIONS
COMMISSION

Walter C. Miller /s/
Walter C. Miller
Administrative Law Judge

2 The Presiding Officer informed TeleSTAR at the April 13, 1988 session that by allowing its applications to be dismissed for failure to prosecute, as opposed to being denied on the merits, it now faced another hurdle: that the dismissal would moot its December 28, 1987 reconsideration request. TeleSTAR's counsel indicated he was aware of that problem.

3 There is a basic but often overlooked fact involved. The Trial Judge cannot comply with the Commission's Order to hold an expedited hearing if the party that bears the burden of proceeding and the burden of proof refuses to proceed. It's impossible. The ALJ has no contempt powers; he cannot put anyone in jail - not that he seeks such powers. But he will not stand idly by and let TeleSTAR thumb its nose at the Commission's remand order.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 2055

FCC 87-374
37236

In the Matter of	)	CC DOCKET	85-202
TeleSTAR, Inc.	)	File No. 17	F-P-85
	)	through 17	F-P-85
)		
For Authority to)		
Construct Common)		
Carrier Point-to-)		
Point Microwave)		
Radio Stations)		

MEMORANDUM OPINION AND ORDER

Adopted: December 1, 1987
Released: December 3, 1987

By the Commission: Commissioner [redacted] dissents and issuing a statement at a later date.

1. Before the Commission for consideration are (1) a Review of Decision, TeleSTAR, Inc., 2 FCC [redacted] (1987); (2) an Application for Review filed February 9, 1987 and an Erratum filed February 17, 1987 by TeleSTAR, Inc. (3) Oppositions filed February 26, 1987 by MCI

Telecommunications Corp. and by Western Tele-Communications, Inc. (WTCI); (4) a Petition to Retain Pleading in the Record filed February 26, 1987 by TeleSTAR; (5) Comments filed March 6, 1987 by the Chief of the Common Carrier Bureau; (6) Petitions for Leave to Supplement and Supplements to Application for Review, filed April 9 and August 9 and August 20, 1987 by TeleSTAR; 1/ (7) an Opposition filed April 20, 1987 by MCI; (8) an Opposition and Request for Dismissal filed April 20, 1987 by WTCI; 2/ (9) a Motion to Accept Late Filed Comments and Comments, filed August 10, 1987 by the Bureau; and (10) an Opposition filed August 19, 1987 by WTCI.

2. On February 24, 1987, the Common Carrier Bureau served Comments on application for Review on the Administrative Law Judge, the Review Board, and the parties. The pleading was never filed with the Commission's Secretary or distributed to

the appropriate Commission offices. In its March 6 Comments, the Bureau stated that it would "take no position, pro or con, on the Review Board's Decision." TeleSTAR's

February 26 petition asks the Commission to retain the February 24 pleading as part of the record. The petition is granted and the Bureau's pleading will be made a part of the record because it was served on Commission decision making personnel.

3. The Bureau's August 10 Motion to Accept Late-filed Comments and Comments were filed more than six months after the expiration of the filing period specified in 47 C.F.R. 1.115(d). Ordinarily, we would deny such a motion as dilatory if filed by a private party. However, we will make an exception for the Bureau in this case and grant the motion. The Bureau asserts that its late filed Comments are required because of "subsequent Bureau enforcement actions." We decline to accept the Comments for this

reason because the Bureau is not identified or cited any recent enforcement actions in its pleadings. Instead, we grant the motion because we are considering TeleSTAR's basic qualifications, and we find that equity and the public interest will be best served by considering the Bureau's comments. The Bureau's function is to advise and make recommendations to the Commission . . . in matters pertaining to regulation and licensing of communication common carriers," including "adjudication . . . proceedings." 47 C.F.R. (a). Accordingly, we will grant the Bureau's motion and accept its labeled Comments.

I. BACKGROUND

4. This proceeding involves 15 applications filed by TeleSTAR for authority to construct common carrier microwave radio stations connecting Salt Lake City, Utah and Denver, Colorado. TeleSTAR constructed substantial parts of its proposed system without construction permits, thereby

violating 47 C.F.R. 21.3. In pertinent part, section 21.3 provides:

No construction or modification of a station may be commenced without a construction permit, a modified construction permit, or other authority issued by the Commission for the exact construction or modification to be undertaken, except as may be specifically provided for in other sections of this part.

ALJ Walter C. Miller denied TeleSTAR's applications, finding that TeleSTAR willfully violated section 21.3 and intentionally misrepresented material facts to the Commission about its premature construction. TeleSTAR, Inc., FCC 86D-30 (Apr. 18, 1986). The Review Board affirmed that decision, concluding that TeleSTAR willfully violated section 21.3 and that "its principals made serious and numerous misrepresentations to the FCC, and displayed

an egregious lack of candor in this proceeding." 2 FCC Rcd at 13 24.

5. TeleSTAR argues in its Application for Review that the ALJ failed to provide specific demeanor findings to support his candor conclusions. TeleSTAR contends that documents drafted before it started construction prove that its principals did not understand the Commission's processes. TeleSTAR asserts that its principals believed that TeleSTAR could begin constructing facilities, without a specific authorization, immediately after completing the coordinating process for the frequencies to be used; and that it acted in good faith because TeleStar did not in fact begin construction until after the completion of frequency coordination. TeleSTAR's principals wrote letters on June 7 and July 14, 1984 to its shareholders stating that it intended to begin construction before construction permits

were issued. TeleSTAR Ex. 1, Attachments H, I. TeleSTAR argues that its principals would not have written the letters had they known that construction was prohibited. TeleSTAR therefore concludes that it unwittingly violated section 21.3, that its premature construction should not disqualify it, and that it was candid in its representations to the Commission.

6. The Bureau in its February 24 and August 10 Comments urges us to grant TeleSTAR's applications and impose a monetary forfeiture. The Bureau criticizes as inadequate the ALJ's demeanor of TeleSTAR's witnesses indicated that they could not be believed. February 24 Comments at 3-4; August 10 Comments at 4-5. The Bureau contends that the credibility of the witnesses' version of the facts -- that they did not know they were required to obtain Commission approval before beginning construction -- was the ultimate question of

fact which needed to be decided, August 10 Comments at 5, and "[t]here is virtually no direct evidence in the record that undermines TeleSTAR's testimony at the hearing regarding their lack of knowledge of the Commission's preconstruction approval requirement." Id. at 5 n.4. The Bureau urges the Commission to review the record and make its own findings.

7. The ALJ and Review Board relied on documents indicating to them that TeleSTAR's principals knew that preconstruction approval was required. The Bureau asserts that these same documents just as plausibly support the conclusion that TeleSTAR's principals "adopted the mistaken impression that no preconstruction permit was required." Id. at 7, but argues that the evidence provides an inadequate basis for concluding that TeleSTAR's principals knowingly violated the rule against preconstruction. The Bureau suggest

that "the extreme penalty of denial of the applications," Id. at 6, demands a degree of certitude greater than that supportable by the evidence here. Furthermore, the Bureau argues, several mitigating factors are present, including TeleSTAR's inexperience as a common carrier and its clean history of no prior misconduct. Id. at 7.

II. DISCUSSION

8. Burden of Proof: Under 47

U.S.C. 309(e), "[t]he burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission." Where an applicant has peculiar knowledge of the operative facts concerning the alleged misconduct, it must bear the burden of proof as well as the burden of proceeding with the introduction of evidence with respect to the

disputed matters. Granbury Communications Co., 68 FCC 2d 966, 969 (1978). Here, the operative facts with respect to the specified issues are peculiarly within the knowledge of TeleSTAR's principals, and the Hearing Designation Order placed both the burden of proof and the burden of proceeding on TeleSTAR. TeleSTAR, Inc., 50 Fed. Reg. 27055 (published July 1, 1985).

9. Thus, the burden is on TeleSTAR to establish by a preponderance of the evidence both that it is qualified to be a licensee and that the public interest will be served by grant of its applications Steadman v. SEC, 450 U.S. 91, 100-102 (1981). Specifically, at this point in the proceeding, TeleSTAR bears the burden of proving that (1) its premature construction was effectuated without knowledge that the construction was in violation of section 21.3 and (2) that it did not exhibit a lack

of candor or intentionally misrepresent material facts to the Commission.

10. The FCC, however, does not lightly deny any application. The denial of an application is the most severe penalty which we can impose. This, moreover, is a single applicant proceeding for a common carrier license. The applications are not mutually exclusive with other applications. Accordingly, the denial of TeleSTAR's applications will delay service and inhibit the growth of competition in microwave services between Denver and Salt Lake City. This is a close case. As set forth below, there are conflicts and gaps in the record which make it impossible to resolve this proceeding with sufficient certitude to determine whether we should grant or deny TeleSTAR's applications. Although on the face of the record TeleSTAR does not appear to have met its burden of proof, we will remand this proceeding to the ALJ to compile

a more complete record, and to issue a supplemental initial decision.

11. THE ALJ'S Credibility Findings:

A key factor in determining whether TeleSTAR is qualified to be a licensee is the veracity of its principals. The ALJ and the Review Board resolved conflicts in testimony and the candor and misrepresentation issue adversely to TeleSTAR. The ALJ, however, failed to make specific demeanor findings in support of his candor and misrepresentation conclusions. TeleSTAR, Inc., 86D-30, 61-64. Deference is generally given to an ALJ's credibility determinations because he has had a superior opportunity to observe and evaluate a witness, "including the expression of his countenance, how he sits or stands, [and] whether he is inordinately nervous." Penasquitos Village, Inc. v. NLRB, 565 F2D 1074, 1078 (9th Cir. 1977). On the other hand, the Commission can "look only at cold records." Id. The Commission has held

that an ALJ's demeanor determinations "should be supported by some specification to be accorded significant weight." Gulf Coast Communications, Inc., 812 FCC 2d 506 (Rev. Bd. 1979), recon, denied, FCC 81R-11 (Apr. 11, 1981), review denied, FCC 82-128 (Apr. 16, 1982). We find that it is difficult in this case to resolve the conflicts in the hearing testimony based on the reading of a cold record, without the benefit of specific demeanor findings. A remand will assist the equitable resolution of this proceeding because the ALJ will be able to specify particularity the demeanor observations that support his credibility conclusions, which in turn will assist our consideration of the record.

12. TeleSTAR's Applications:

TeleSTAR began constructing its facilities in September 1984. In December 1984, TeleSTAR's outside counsel for communications matters sent TeleSTAR copies

of Part 21 of the rules, which contains the prohibition against premature construction. TeleSTAR Ex. 14. On January 4, 1985, TeleSTAR's president, Noel Stewart, certified TeleSTAR's applications, attesting that he had reviewed the applications and that they were true and complete to the best of his knowledge. The applications represented that "TeleSTAR proposes to construct" its facilities. TeleSTAR's principals did not object to the representation concerning its intent to construct, nor did they advise their FCC counsel that TeleSTAR had started construction. Tr. at 437-44. TeleSTAR's principals do not contest the facts that construction had already begun and attempted to explain the inconsistency by testifying that the application was prepared by outside counsel for communications matters, that he had not seen all of the exhibits when he signed this particular part" of the ,

application. Tr. at 442-43. Counsel was not aware of the construction until after the applications were filed. TeleSTAR Ex. 3.

13. Noel Stewart also certified in the application that TeleSTAR had a copy of Part 21 and that he was "familiar with all rules affecting the proposed operation."

Application Q. 33. However, TeleSTAR later disavowed these certified statements in the applications, admitting they were incorrect and asserting that Noel Stewart had not had an adequate opportunity to read the rules.

TeleSTAR's motion for Summary Decision at 2 (filed Sept. 30, 1985). Noel Stewart later testified that he "had a short time to review the rules" and that he could "not recall reading" section 21.3 or anything which proscribes construction without a permit. TeleSTAR Ex. 1 at 12; Tr. at 33-38. On the basis of the present record, we find that TeleSTAR's certification practices were sloppy and ill-advised, but that these

matters standing alone do not warrant denial of its applications. See WIOO, Inc., 95 FCC 2d 974, 990-91 (1983).

14. TeleSTAR's Pleadings:

Questions also exist as to TeleSTAR's explanations to the Commission in various pleadings concerning its premature construction. It first advanced one explanation for its premature construction and then abandoned that explanation in favor of a conflicting explanation when it became apparent that its initial contentions were inconsistent with the facts. Thus, on March 21, 1985 TeleSTAR filed an Opposition to Petition to Dismiss its Applications, arguing that section 21.3 "is very amenable to misinterpretation" and that it understood section 21.3 of the rules to prohibit the "installation and connection of hertzian wave propagation equipment." TeleSTAR Ex. 1, Attachment K at 30-31. The Hearing Designation Order found that TeleSTAR's

explanation was not persuasive because its construction had already included antennas and waveguides which are "hertzian wave propagation equipment." 50 Fed. Reg. 27055 11 (1985).

15. TeleSTAR then abandoned its initial argument that it misinterpreted the rules in the September 20 Motion for Summary Decision, there TeleSTAR attributed the argument that it misunderstood the Commission's rules to its outside counsel for communications matters. TeleSTAR also argued for the first time that Noel Stewart was not "aware of or had ever seen" section 21.3 before starting construction. Motion for Summary Decision at 2. This new argument conflicted with Noel Stewart's earlier certification that the March Opposition was "prepared under . . . [his] supervision" and that the facts contained in the Opposition were true. TeleSTAR Ex. 1, Attachment K at 85. Noel Stewart explained at the hearing

that the Opposition was prepared by TeleSTAR's communications counsel, that he did not read it until after it was served, and that after reading the Opposition "nothing bothered" him. Tr. at 346. In view of the discrepancies in the evidence reflected above and the fact that the burden of proof is on TeleSTAR, we are unable to resolve these matters favorably to TeleSTAR. Therefore, we find a need for further examination of TeleSTAR's principals and other witnesses concerning the drafting and execution of TeleSTAR's pleadings.

16. TeleSTAR's Knowledge of the Construction Permit Requirement: Noel Stewart and his brother, Doyle Stewart, who is Chairman of TeleSTAR, testified that they believed TeleSTAR could begin construction after the completion of the frequency coordination process even if TeleSTAR had not yet received a written authorization from the Commission. Tr. at 327-29, 528-31.

However, their testimony is rebutted by the record. TeleSTAR distributed a Private Placement Memorandum (PPM) dated January 16, 1984 to explain its proposed operations to prospective investors. Doyle Stewart testified that he drafted the section of the PPM relating to site construction, which states that "construction of the sites will begin upon a preclearance release from the FCC for construction to begin. This order is obtainable from the FCC usually after frequencies have been out on 'user notification.'" Tr. at 518-20; TeleSTAR Ex. 1, Attachment E at 31. The PPM also contained a flow chart indicating that TeleSTAR would get "FCC Pre-Build Orders" before constructing facilities. Id. at 64.

17. Although the PPM used different terminology than the Commission's rules, it conveyed to TeleSTAR's shareholders the message that an affirmative authorization was required from the Commission before

TeleSTAR could start building its facilities. When explaining the language used, Noel Stewart later asserted that he had "no recollection of the 'Pre-Build Order'" mentioned in the PPM. TeleSTAR Ex. 1 at 6. He stated: "Based on information available to us and our impressions, I believed . . . that FCC approval was necessary before radio equipment was installed or operated, but that it was not necessary before site construction began." TeleSTAR Ex. 1 at 5. Noel Stewart testified that his "impression [was] . . . formed without benefit of any expert legal or other advice." Id. It would appear, however, that at least Doyle Stewart had knowledge of the requirements at the time. He admitted to being the author of those sections of the PPM.

16. The Stewarts now argue that they later were led to believe that the FCC's requirements had changed. In this

respect, on April 17, 1984, Noel Stewart wrote TeleSTAR's shareholders that the Commission's processes had been changed and that "the FCC now requires only that a Construction Permit (CP) be obtained and that an application have been filed for frequency licenses." TeleSTAR Ex. 1, Attachment G at 3. In a letter dated June 7, 1984, Noel Stewart described as follows the steps to be taken before licensing and operation:

(1) Prior coordination (User Notification), (2) construction acquisitions and preparations, (3) site acquisition and formal leases on privately owned sites, (4) implementation of Phase II construction (low cost items and pre-fabrications), (5) finalization of User Notification coordination, (6) public notification, (7) FCC granting of CP and final constructions. The letter continued:

Some preliminary constructions of towers and other items will soon be underway.

After the 30-day User Coordination is over--anticipated time-frame is mid July--some private sites will be obtained and the construction phase will begin on certain sites. Upon finalization of public notification and granting of CP by the FCC the construction process will be well underway. Tower and shelter designs are being completed now in preparation for the construction phase.

TeleSTAR Ex. 1, Attachment H at 7. In a letter dated July 14, 1984, TeleSTAR advised its shareholders that the frequency coordination process was nearing completion and that:

After prior coordination, as previously mentioned, a 435 Form will be filed with the FCC for an FCC construction permit (CP). The FCC CP will usually be granted after an

additional 30-day public notice by the FCC. Hopefully, before receiving the FCC CP, most of the private sites will be constructed which will leave 2 - 3 remaining sites to be completed during September after receiving the FCC CP, TeleSTAR Ex. 1, Attachment I at 4.

19. TeleSTAR's letters to its shareholders readily admitted an intention to construct facilities before receiving a permit from the Commission. TeleSTAR argues that this admission established its good faith because it would not have knowingly admitted its intention to construct facilities in violation of section 21.3. Although at first blush this argument has a certain appeal, without further information we cannot fully exonerate TeleSTAR on this basis.

20. TeleSTAR failed to present substantial evidence concerning what caused both Stewarts to mistakenly believe the

FCC's rules had changed. TeleSTAR maintains that Noel and Doyle Stewart's erroneous interpretation of the Commission's rules was developed after meetings with industry representatives. The Bureau supports TeleSTAR, arguing that there is "virtually no direct evidence in the record that undermines the Stewarts' testimony concerning their lack of knowledge of the construction permit requirement." The fact is, however, that the PPM -- which Doyle Stewart admits he drafted -- recognized the need for a "pre-build" order. In order to establish that they were later led to believe this requirement had changed, the Stewarts needed to do more than refer generally to meetings with industry representatives.

21. The burden of proof was on TeleSTAR to establish its qualifications, and here that required TeleSTAR to present persuasive evidence of why it went from

knowing about the FCC's pre-reconstruction rule to thinking that the rule had changed. Yet TeleSTAR failed to present any evidence of who the sources were who supposedly led Noel and Doyle Stewart to develop erroneous interpretations of the Commission's rules. No such witnesses were called to testify. When the Stewarts testified concerning their misunderstanding of the rules, they failed to identify the sources or describe any communications which resulted in those erroneous interpretations. Tr. at 327-28, 525.

22. The limited evidence in the record of TeleSTAR's industry contacts suggests the opposite. None of the representatives testified they misled the Stewarts. In an affidavit submitted by TeleSTAR, Edsel Davis of Spectrum Planning, Inc. stated: "I know that I would not have said construction without an FCC permit was permissible." Motion for Summary Decision,

Ex. 7; Tr. at 545-46. The testimony of J. Craig Carmen, TeleSTAR's local corporate attorney, who TeleSTAR asked to investigate the question of TeleSTAR's principal's prior knowledge of the rules, does not add much to the picture. Carmen concluded (1) that, the Stewarts were aware of the need for a construction permit when they drafted the PPM, (2) after subsequently meeting with representatives of Spectrum Planning, Inc., they believed that TeleSTAR could start construction after receiving a "Preliminary Clearance Notification" (PCN), and (3) that TeleSTAR in fact did start construction before it received FCC clearance, but after it received clearance from Compucon, Inc. TeleSTAR Ex. 1, Attachment V. Carmen seems to have similarly relied on statements by Noel Stewart that he believed that a "preclearance construction order" was required when TeleSTAR issued the PPM, but - that discussion with consulting contractors

from Spectrum Planning and Compucon caused Joel Stewart to believe that TeleSTAR could start preliminary construction without a commission authorization. Tr. at 273-77. Farman further testified, however, that representatives of Spectrum Planning and Compucon told him that they would not have advised TeleSTAR that it could begin construction without a construction permit. Tr. at 2673-65, 288. The record, however, does not establish the specific nature of any conversations which these representatives had with the Stewarts -- that is, what they did tell the Stewarts or whether they discussed preconstruction at all -- and there is no explanation in the record concerning how or why the Stewarts came to believe they could start construction without a permit.

23. Doyle Stewart's specific explanation of why he thought construction is permissible also leaves unresolved

questions. He testified that he "never
thought the FCC would be . . . concerned
with the actual construction permit that . . .
[he] would be getting from the city and
county wherever we were building." Tr. at
533 (emphasis added). His testimony
reflects confusion concerning Doyle
Stewart's understanding of the various
construction requirements pertinent to
TeleSTAR's application and merits further
inquiry. The gaps in the evidence described
above provide additional reasons why this
case should be remanded for development of a
more complete record, so that we can
determine whether this is truly a case of
misunderstanding or a case of
misrepresentation or lack of candor. Without
further evidence to show that it was simply
confusion, we are unable to find TeleSTAR
qualified to be a licensee.

24. Representations Concerning
When TeleSTAR Discovered Its Construction
Violated the Rules: TeleSTAR maintains that it did not know that pre-construction was not permitted until it was told otherwise by David Irwin, its counsel for FCC matters, and that it ordered construction stopped after consulting with Irwin. TeleSTAR Ex. 1 at 14. TeleSTAR exhibits establish that work on the construction was completely shut down by January 25, 1985. TeleSTAR Exs. 16, 17, 18. In written testimony TeleSTAR claimed that on January 23, 1985, Steve Amundsen (TeleSTAR's director of marketing) was advised by a representative from Compucon that WTCI was inquiring about TeleSTAR's premature construction; that Amundsen immediately called Irwin, who told him that TeleSTAR should stop construction; that Amundsen discussed the Irwin call with the Stewarts; and that TeleSTAR then ordered all construction halted. TeleSTAR Exs. 1 at

23-24; 2 at 6; Tr. at 331, 596-98. Noel Stewart testified that the discovery that the construction violated the rules was a "surprise . . . and a real shock." TeleSTAR Ex. 1 at 13.

25. Irwin, however, testified that he did not learn about the premature construction until a telephone conversation that occurred on January 29. That date is after TeleSTAR stopped construction. Tr. at 694. Irwin's billing slips support his testimony that he discussed the premature construction with Amundsen on January 29. TeleSTAR Ex. 12. He testified that he could not have been notified about the construction on January 23, because the call from Amundsen was overheard by Frank Inserra (an associate) and he also immediately discussed the call with Sylvia Lesse (his partner); and neither Inserra nor Lesse was in the office on January 23. Tr. at 694, 716-17, 900-01.

26. TeleSTAR's testimony is a
in conflict with a predesignation plead-
it filed. In a Response to Request to
Rejection of Applications, filed February
11, 1985 (TeleSTAR Ex. 1, Attachment S)
TeleSTAR represented that Amundsen did
become aware of the inquiries about the
premature construction until January 24
he did not call Irwin until January 29
the same date that Irwin claims he received
the call. The record before us contains
explanation of how or why the Stewarts
Amundsen concluded that the discussion
concerning premature construction occurred
on January 23, 1985. Because the Stewarts
testified that they did not learn about
FCC's prohibition on premature construction
until their conversation with Irwin, the
date of the conversation is significant
because it is uncontested that construction
was stopped on January 25. If, in fact, the
conversation did not occur until January

then the Stewarts evidently had sufficient knowledge to order the construction halted on their own. In the absence of specific information in this regard, we are persuaded that further hearings are in order so that our ultimate determination can be based on a full record as to these questions.

III. CONCLUSIONS

27. As detailed above, the record does not establish TeleSTAR's qualifications to be a licensee. However, this is a single applicant common carrier proceeding and a denial would be inconsistent with our objective to foster new service for the public and the development of competition. Thus, we have determined not to deny TeleSTAR's applications on the basis of a record filled with gaps, inconsistencies, and numerous unanswered questions. 3/ We are remanding this proceeding to the ALJ for the taking of further evidence on the question of TeleSTAR's qualifications. See paragraph

9, above. Such hearings will enable the parties to develop evidence to eliminate the evidentiary gaps in the record, and it will allow the ALJ to provide demeanor findings to support his credibility determinations. The Burden of proceeding with the introduction of evidence and the burden of proof with respect to TeleSTAR's qualifications remain on the applicant. Without further hearings to resolve the unanswered questions regarding TeleSTAR's premature construction, we would have no basis to reverse the conclusion of both the ALJ and the Review Board that TeleSTAR is unqualified to be a licensee. The ALJ is instructed to expedite such further proceedings and to issue a Supplemental Initial Decision. The Supplemental Initial Decision shall be appealable directly to the Commission.

IV. ORDERS

28. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED TO THE Administrative Law Judge for further proceedings in accordance with this Memorandum Opinion and Order.

29. IT IS FURTHER ORDERED That the Petition to Retain Pleading in the Record filed February 26, 1987 by TeleSTAR, Inc. IS GRANTED, and the Comments on Application for Review, served on the parties on February 24, 1987 by the Common Carrier Bureau IS INCLUDED in the record of this proceeding.

30. IT IS FURTHER ORDERED, That the Petitions for Leave to Supplement filed April 9 and August 20, 1987 by TeleSTAR, Inc. ARE DENIED.

31. IT IS FURTHER ORDERED, That the Motion to Accept Late-Filed Pleading filed August 10, 1987 by the Common Carrier Bureau IS GRANTED.

32. IT IS FURTHER ORDERED, That the Petition for Leave to Substitute Opposition and Request for Dismissal filed May 5, 1987 by Western Tele-Communications, Inc. IS GRANTED; and that the Opposition and Request for dismissal filed May 5, 1987 by Western Tele-Communications, Inc. IS ACCEPTED.

FEDERAL COMMUNICATIONS
COMMISSION

William J. Tricarico
Secretary

1/ The supplements seek to call to the Commissions' attention to the Petition for Revocation of FCC Authority filed against MCI by TeleSTAR on April 1, 1987. TeleSTAR has not shown that the petition is relevant to TeleSTAR's qualifications or that it would otherwise warrant any change in our present disposition of this proceeding. We, therefore deny the petitions for leave to supplement TeleSTAR's Application for Review.

2/ On May 5, 1987, WTCI filed a Petition for Leave to Substitute Opposition and Request for Dismissal, and a revised Opposition and Request for Dismissal. WTCI asserts that it filed the revised pleading to remove wording to which TeleSTAR's counsel objected. The petition is unopposed and the revised pleading makes no new arguments. Therefore, we grant WCTI's request and accept its May 5, 1987 pleading.

3/ On the other hand, we wish to make it clear that we would not reach such a result in a case where immediate new service and competition could be provided by grant of a fully qualified competing applicant, as is ordinarily the case in our comparative broadcast proceedings.

EDITOR'S NOTE:

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89-1770



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JOSEPH F. SPANIO
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TeleSTAR, Inc.,

Petitioner;

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent;

MCI COMMUNICATIONS CORPORATION,
WESTERN TELE-COMMUNICATIONS, INC.,

Intervenors.

APPENDIX (VOLUME II)

PETITION FOR WRIT OF CERIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

DONALD F. BEACH
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DATE FILED: February 26, 1990
(CORRECTED COPY)



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ORDER AND NOTICE OF APPARENT LIABILITY

By the Commission:

1. In this order, we address a "Petition for Revocation of FCC Authority for MCI" filed by TeleSTAR, Inc. and its principals (TeleSTAR)¹ requesting immediate suspension and revocation of Commission radio authorizations issued to MCI Telecommunications Corporation (MCI).² MCI filed an Opposition to TeleSTAR's petition, and TeleSTAR replied.³ For reasons discussed more fully below, we deny TeleSTAR's petition for revocation of MCI's

authorizations. We are, however, issuing to MCI a Notice of Apparent Liability for forfeiture in the amount of \$10,000 for engaging in premature and/or unauthorized construction in violation of Section 319(a) of the Communications Act, 47 U.S.C. 319(a), and Sections 21.3(b) and 21.7(a) of the Commission's Rules, 47 C.F.R. 21.3(b), 21.7(a)4

I. CONTENTIONS OF THE PARTIES

A. TeleSTAR

2. TeleSTAR requests immediate suspension and revocation of license authorizations issued to MCI based on allegations that MCI has: (1) engaged in unlawful premature construction with respect to seven routes; (2) engaged in 20 separate incidents of unauthorized service commenced under a construction permit; (3) violated the Commission's rules regarding frequency coordination on three occasions; (4) violated local zoning and building permit

laws; (5) violated federal environmental laws; (6) improperly represented in a construction permit application that four antenna sites were not located on federal lands; and (7) in connection with several of these allegations, engaged in misrepresentation and demonstrated a lack of candor. In addition, TeleSTAR argues that (8) the Commission has shown improper favoritism to MCI over TeleSTAR in violation of the Equal Protection Clause of the U.S. Constitution.⁵

B. MCI

3. MCI generally either denies most of the alleged violations or disputes their relevance to MCI's qualifications to be a Commission licensee. It criticizes much of TeleSTAR's supporting material as being insufficiently specific and disagrees with various inferences and interpretations made by TeleSTAR.

4. As a result of its detailed internal investigation, however, MCI admits that it

has engaged in unlawful premature construction with respect to four of the seven routes identified by TeleSTAR. MCI also admits that, on two occasions, it improperly commenced operation prior to filing its Form 436 license applications, and incorrectly checked the wrong box regarding use of federal lands on Form 435 applications on four occasions.

II. DISCUSSION

A. Premature Construction

5. Under Section 319(a) of the Communications Act and Sections 21.3(b) and 21.7(a) of our Rules, an applicant is prohibited from commencing station construction prior to receipt of Commission authorization for such construction.⁶ The prohibition on premature construction is not absolute, however, rather, "the literal language of Section 319(a) must be read in conjunction with our companion statutory responsibility to provide a prompt institution" of service to the public.

Patton Communications Corporation, FCC 2d 336, 338 (1980). In this regard, while pre-authorization tower construction or installation of radio antennas is clearly prohibited, we have permitted, inter alia, the following steps to be taken prior to receipt of authorization to construct: site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors, installation of a new power line, purchase and on-site storage (but not installation) of radio equipment and other "preliminary steps" not having an "intrinsic" radio communication use "related to the proposed facility." See Christian Broadcasting of the Midlands, Inc., 103 FCC 2d 375 (1986), reconsideration denied, FCC 87-328, released Oct. 19, 1987; King Country Broadcasters, 55 RR 2d 1591, 1592 (1984), overruled on other grounds, Christian Broadcasting of the Midlands, Inc., 103 FCC 2d 375 (1986), reconsideration denied, FCC

87-328, released Oct. 19, 1987; Patton Communications Corporation, 81 FCC 2d 336, 338 (1980); Childress Broadcasting Corp., 24 RR 669 (1962).

6. With these standards in mind, we now turn to TeleSTAR's specific allegations regarding premature construction.

1. Glenshaw/Erie

7. TeleSTAR claims⁷ that MCI constructed towers and engaged in other unspecified construction with respect to four sites on its Glenshaw to Erie, Pennsylvania route prior to grant of an STA in December, 1982. MCI admits that it improperly began tower construction of all four sites, beginning on October 7, 1982, roughly two months before receiving Commission authorization to do so. We have no facts before us showing that MCI engaged in any other improper premature construction.

2. Las Vegas/Dominquez Hills

8. TeleSTAR claims that MCI engaged in unspecified construction on its Las Vegas, Nevada to Dominguez Hills (Los Angeles), California route, specifically at the Newberry and Heaps Peak sites, prior to grant of an STA on November 8, 1985. In addition, it claims that MCI installed two antennas on its Sidewinder tower for which it never received authorization.

9. We have no evidence before us that MCI engaged in any improper preconstruction with respect to the Newberry site. The fact that some unspecified construction was observed "in the summer of 1985" (Petition at 7, n.22 & Att. A.4) does not indicate that any such construction was improper. Moreover, MCI has explained that such construction was merely "initial site preparation." (Opposition at 53.) With respect to the Heaps Peak site, MCI admits that the tower at this site was in fact

constructed approximately two weeks prior to receipt of an STA.8 MCI also admits that it did place (but has not operated) two unauthorized antennas on the Sidewinder tower, and that those antennas remain in place even though MCI has not applied for Commission authorization for them. While MCI claims that such "storage" of antennas on a tower is permissible, we conclude that the placement (and continuing maintenance) of these antennas on the tower constituted unauthorized construction. Compare Childress Broadcasting Corp., 24 RR 669 (1962).

3. Downers Grove/Pleasant View

10. TeleSTAR claims that MCI "likely" engaged in premature construction of its Downers Grove, Illinois to Pleasant View, Illinois route in 1982. (Petition at 10. MCI admits that it improperly constructed four towers on this route, beginning approximately seven weeks prior to grant of authorization to commence such construction on July 7, 1983.

4. Downers Grove/Creve Coeur

11. TeleSTAR claims that MCI engaged in premature construction with respect to its Downers Grove, Illinois to Creve Coeur, Missouri route in 1981, because it completed construction within 26 days of grant of an STA on October 22, 1981. It says such construction was "implausible," and cites to the fact that Commission staff informally noted an initial question regarding the timing of MCI's license applications. (Petition at 10.) MCI's explanation, supported by affidavit, of how construction was accomplished in such a period convinces us that TeleSTAR has not shown that any improper premature construction took place with respect to this route.⁹

5. Sacramento/Chico

12. TeleSTAR claims that, prior to receiving an STA on February 10, 1987, MCI engaged in premature construction with

respect to the Erle, Gridley and Chico sites on its Sacramento, California to Chico, California route.

13. With respect to the Erle site, TeleSTAR provides an unsworn, unnotarized statement that the tower we constructed by the end of January , 1987, even though MCI did not receive its STA until February 10, 1987. MCI has explained, however, that with respect to the tower it merely acted as a contractor for the site owner, Southern Pacific, in replacing an existing tower. As MCI points out, any necessary authorization for the replacement tower was the responsibility of Southern Pacific, not MCI. TeleSTAR also provides an unsworn, unnotarized statement that antennas were placed on the Erle tower in February, 1987. Any premature installation of antennas would, of course, be MCI's responsibility, since it was the party seeking Commission authorization in that regard. MCI's evidence

shows, however, that antenna mounting at the Erle site did not begin until February 13, 1987. This is both after the STA was granted and fully consistent with TeleSTAR's statement that such antenna installation was observed some time in February, 1987. Accordingly, we find that no improper premature construction by MCI has been shown with respect to the Erle site.

14. We reach a similar conclusion with respect to the Gridley site. Any premature tower construction was the responsibility of Southern Pacific, the site owner, not MCI. Moreover, MCI has shown that antenna mounting at this site did not begin until February 25, 1987, after grant of the STA.

15. TeleSTAR also alleges that construction of the tower at the Chico site was completed January 7, 1987, prior to the February 10, 1987 grant of MCI's STA. As MCI explains, however, the Chico tower was also

part of its Chico to Portland, Oregon route, for which it received construction authorization on July 24, 1986. Accordingly, the tower construction was not premature. Although TeleSTAR did not allege premature installation of any antennas at the Chico site, MCI admits that three antennas were prematurely mounted at the Chico site up to four days prior to receipt of the STA.

6. Lafayette/New Zion

16. TeleSTAR claims that, prior to receiving a construction permit on February 26, 1987, MCI engaged in premature construction with respect to the Lafayette, Carencro and New Zion sites on MCI's Lafayette, Louisiana to New Zion, Louisiana route.

17. With respect to the Lafayette site, TeleSTAR alleges only that building construction took place prior to grant of the construction permit. MCI concedes this fact, but explains that the building had no

intrinsic radio use; its use included the housing of MCI marketing and administrative personnel. Given this fact, along with the other evidence (e.g., daily field reports) provided by MCI, it is apparent that no showing has been made that improper premature construction took place at the Lafayette site.

18. With respect to the Carencos site, TeleSTAR has provided only unsworn, unnotarized statements generally alleging that site construction began in January, 1987 (before grant of the STA) and was completed in March, 1987 (after grant of the STA). No specific allegation of improper premature construction, such as tower construction, has been made. Moreover, MCI has shown that tower construction did not commence until March 12, 1987. Accordingly, we find no showing of improper premature construction with respect to the Carencos site.

19. TeleSTAR provides an unsworn, unnotarized statement that the tower at the New Zion site was completed before Christmas, 1986, and similar statements that other, unspecified construction took place earlier in 1986. The non-specific allegations regarding unspecified construction do not demonstrate improper premature construction. Moreover, MCI's evidence regarding tower construction, including daily field reports and purchase orders, convinces us that no improper premature tower construction occurred.

7. Denver Junction/Colorado

20. TeleSTAR claims that MCI engaged in unspecified construction at the Cabin Gulch and Colorado South sites on its Denver Junction, Colorado to Colorado Springs, Colorado route beginning in March or the Spring of 1985. TeleSTAR's generalized claims do not support a finding of improper preconstruction, especially

since we note that MCI received an STA for these sites on March 26, 1985. Moreover, MCI has demonstrated through its daily field reports that tower construction did not commence until after grant of the STA.8.

Conclusion

21. For the most part, TeleSTAR's allegations regarding premature construction are not sufficiently specific or substantiated to demonstrate that MCI has engaged in unlawful premature construction. However, in response to TeleSTAR's allegations, MCI has brought to our attention certain facts and made admissions that lead us to conclude that MCI has engaged in improper premature construction as follows: (1) construction of four towers on the Glenshaw/Erie route approximately two months early, in 1982; (2) construction of one tower on the Las Vegas/Dominguez Hills route in 1985; (3) unauthorized construction of two antennas on the Las Vegas/Dominguez

Hills route in 1985, which has not yet been rectified; (4) construction of four towers on the Downers Grove/Pleasant View route approximately seven weeks early in 1982; and (5) mounting of three antennas on its Sacramento/Chico route up to four days early in 1987.

B. Unauthorized Operation

22. Section 21.212(b) of our Rules requires that a permittee may commence service tests (e.g., begin commercial service) "after" the filing of a license application (Form 436), provided, inter alia, that the Commission's Engineer-in-Charge of the local radio district has been notified at least two days in advance of the beginning of tests of the time and date when such tests "are scheduled to begin." 47 C.F.R. 21.212(b). Form 436 reiterates this requirement and mandates that the permittee provide "the date service tests are scheduled to begin and the date of notification of service tests to the FCC

Engineer-in-Charge." It provides spaces labeled "Service Tests Start Date" and "EIC Notification Date" for responses to these items.

23. TeleSTAR claims that, on 20 separate occasions,¹¹ MCI began commercial operation (service tests) prior to filing its Form 436. In support of these allegations, it provides no evidence of when MCI actually commenced service with respect to the sites involved. Rather, it assumes that operation must have commenced on the "scheduled" dates set forth in MCI's Form 436s and in its notifications to the Engineer-in-Charge. In all 20 instances,¹² these scheduled dates for commencement of service were prior to the dates MCI's Form 436s were filed.

24. We find no basis for TeleSTAR's general inference that the scheduled service dates in MCI's filings must have been the same as the actual ones.

Indeed, in its notifications to the Engineer-in-Charge, MCI stated that service would commence "on or after" the dates stated (See Opposition at Ex. D), and MCI explained that service routinely can commence long after the scheduled startup date because of technical and other difficulties. In addition, with two exceptions noted below, MCI denies that service actually commenced prior to the filing of its Form 436s. However, based on information contained in a 1984 MCI filing, TeleSTAR does document that MCI filed a Form 436 four years late on its Downers Grove/Boyertown, Pennsylvania route. However, MCI itself disclosed this information to the Commission in 1984. (See Opposition at Ex. D-3.2). In addition to this previously-admitted error, MCI has admitted that, in 1980, it filed a Form 436 for its Chicago/Creve Coeur route late (by eight months, according to TeleSTAR).¹³

C. Frequency Coordination

25. Section 21.100(d) of our Rules requires that, prior to filing a construction permit application, applicants "coordinate proposed frequency usage with existing users in the area and other applicants with previously filed applications, whose facilities could affect or be affected by the new proposal in terms of frequency interference or restricted ultimate system capacity." 47 C.F.R. 21.100(d). Section 21.100(d) mandates pre-filing notification of a proposal, in "oral or written form," and provides for a 30-day response period for those notified. An applicant must certify in its application that frequency coordination, including response, has been completed. If a party does not respond to notification, or if "technical problems are not resolved," that fact must be disclosed in the application. Id. See also 47 C.F.R. 21.199(d)(6) ("[a]ll

technical problems that come to light during coordination must be resolved unless a statement is included with the application to the effect that the applicant is unable or unwilling to resolve the conflict and briefly the reason therefore.")

26. TeleSTAR claims that MCI violated Section 21.100(d) on three occasions, involving: (1) its Los Angeles, California to Las Vegas, Nevada route in 1985; (2) its Downers Grove to Chicago to Pleasant View route in 1983; and (3) its Wayneville, Ohio to Atlanta, Georgia route in 1981.

1. Los Angeles/Las Vegas

27. TeleSTAR claims that MCI violated Section 21.100(d) by stating in a 1985 Form 435 construction permit application with respect to its Los Angeles to Las Vegas route that "[f]requency coordination with other carriers has been successfully completed." even though there were

unresolved frequency coordination disputes with two cable systems. MCI explains that its frequency coordinator contractor had informed MCI that frequency clearance had been accomplished. Once the frequency clearance disputes became evident to MCI after its application was filed, MCI worked with the cable systems to resolve the problems.

28. We believe that, while MCI appears to have relied in good faith on its frequency coordinator contractor, its failure to notify the Commission of unresolved frequency disputes in its construction permit application (and its statement that coordination had been successfully completed) constituted a violation of Section 21.100(d). Regardless of its own good faith, MCI is responsible for the actions of its agents with respect to compliance with our rules.

2. Downers Grove/Chicago/Pleasant View

29. From the facts set forth by both TeleSTAR and MCI, it appears to be undisputed that MCI filed a construction permit application in 1983 for its Downers Grove to Chicago to Pleasant View, Illinois route stating that "frequency coordination with other carriers has been successfully accomplished," even though MCI and United Video, Inc., (United Video) were still engaged in negotiations for an assurance from MCI that no interference would occur because if any did, MCI would take any necessary steps to resolve it. (See Opposition at 14 and Ex. B-4); Petition at Att. A.40 pp. 1-2) MCI appears to have believed that, because the unresolved frequency coordination dispute did not relate to the need for remedial changes in its technical proposal, no notification to the Commission was required and also appears subsequently to have acted to resolve the

negotiations. See 40, infra. Nevertheless, MCI's failure to disclose the disputes existence in its application (and its statement that coordination had been successfully accomplished) constituted a violation of Section 21.100(d).

3. Wayneville/Atlanta

30. TeleSTAR claims that MCI filed Form 435 applications for its Wayneville, Ohio to Atlanta, Georgia route in 1981 without giving other users 30 days to respond to its notification and that MCI failed to disclose the existence of an unresolved frequency coordination dispute with Southern Bell. As an initial matter, we have been presented with no evidence that Southern Bell in fact objected to any of MCI's frequency coordination notifications prior to the filing of MCI's applications. As to the lack of 30-day notice, the notifications involved were apparently subsequent (not initial) notifications, with

respect to which our Rules provide for shortened response periods. See 47 C.F.R. 21.100(d)(8). It appears that MCI followed these rules in good faith by requesting responses to subsequent notifications in less than 30 days. Accordingly, we find no violation in this instance.

D. Local Laws

31. TeleSTAR alleges that MCI violated local building and zoning laws in connection with sites in San Bernadino, California, and local building laws in connection with sites in Pueblo County, Colorado. MCI responds that both situations involved building permits, not zoning laws. In any event, it is clear that whatever violations of local ordinances occurred do not affect MCI's qualifications to remain a Commission licensee. As we recently made clear, only three classes of non-FCC misconduct are considered in evaluating character qualifications: (1) adjudicated fraudulent

statements to "another governmental unit";
or (3) adjudicated violations of
anticompetitive or antitrust laws in
connection with station-related misconduct.
Policy Regarding Character Qualifications In
Broadcasting Licensing, 102 FCC 2d 1179,
1195-1201, on reconsideration, 1 FCC Rcd 421
(1986), appeal dismissed sub nom. National
Association of Better Broadcasting v. FCC
No. 86-1179(D.C. Cir. June 11, 1987)

E. Environmental Laws

32. In its Reply, TeleSTAR makes
various passing references to alleged
violations by MCI of federal environmental
laws. (See Reply at 21 n.41, 25, 39, 40).
Due to the lack of specificity and clarity
in its allegations, we are unable to
determine their precise nature and cannot,
therefore, specifically address them. We
note, however, that its statements that
microwave towers over 100 feet are "major"
actions under the Commission's environmental

rules are based on a 1974 order that was changed on reconsideration. Implementation of the National Environmental Policy Act of 1969, 40 Fed. Reg. 53,391 (Nov. 18, 1975) ("We have decided on a basic cutoff of 300 feet for all towers"). The tower height restriction was lifted altogether in 1986. Amendment of Environmental Rules, 51 Fed. Reg. 14,999 (April 22, 1986).

F. Use of Federal Lands

33. TeleSTAR claims that MCI violated Section 21.20(b)(7) of the Commission's Rules by stating, in response to Item 12 on Form 435s filed for its Las Vegas to Dominguez Hills route in 1985, that four particular sites (Waterman, Sidewinder, Halloran Summit and Goodsprings) were leased, rather than on Federal Government land. MCI admits that it inadvertently checked the wrong box on these applications.

34. Section 21.20(b)(7) of the Rules lists, as an example of a deficiency that results in an application being defective, that "[t]he application does not include U.S. Forest Service or Bureau of Land Management certification of site availability under 1.70 if this chapter whenever a proposed new or modified facility is to be located on land under the jurisdiction of these agencies." 47 C.F.R. 21.20(b)(7) (emphasis added). Section 1.70 and the similar certification requirement contained in Section 21.15(b) were eliminated in 1977 on the basis that there was "no need for such procedures."

Elimination of Coordination Procedures With U.S. Department of Agriculture and U.S. Department of the Interior, 42 Fed. Reg. 27,894 (1977). Accordingly, the example set forth in Section 21.20(b)(7) reflects no underlying substantive requirement, and MCI's apparently inadvertent checking of the

wrong box, although an incorrect statement, violates no substantive rule.

G. Misrepresentation/Lack of Candor

35. TeleSTAR alleges that MCI engaged in misrepresentation or demonstrated lack of candor in connection with statements in applications regarding its premature construction violations, unauthorized operation, frequency coordination violations, violations of local ordinances and use of federal lands. It is apparent that, in connection with its violations in these area (set forth above), MCI's applications to the Commission did contain certain inaccuracies. Accordingly, we will examine these violations to determine whether the inaccuracies rose to the level of misrepresentation or lack of candor.

36. In making these determinations, we will look closely to determine whether we have been presented with evidence that MCI intended to deceive

the Commission, since as we have previously made clear, "Both misrepresentation and lack of candor represent deceit" Fox River Broadcasting, Inc., 93 FCC 3d 127, 129 (1983). Unless there is evidence showing "deceptive intent," we will not be able to find that misrepresentation or lack of candor has occurred. Id., The "bare existence of a mistake" in an application, "without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation or raise a substantial and material question of fact." Kaye-Smith Enterprises, 71 FCC 2d 1402, 1415 (1979).

37. With respect to MCI's premature and/or unauthorized construction on four routes, TeleSTAR has presented no evidence showing that MCI intentionally failed to disclose in its applications the fact that premature and/or unauthorized

construction had, or was about to, occur. MCI's explanations of how the various instances of premature and/or unauthorized construction occurred convinces us that they generally resulted from failures in internal communications or communications with contractors, that the MCI officials who signed applications to the Commission were not aware of any such violations, and that any misstatements were inadvertent.¹⁵

38. With respect to MCI's unauthorized operation on two routes, again TeleSTAR has presented us with no evidence showing that MCI intentionally failed to file its license applications on a timely basis and therefore engaged in misrepresentation or lack of candor in connection therewith. Since MCI would have no motive to file license applications eight months or four years after commencing service, its mistakes in this regard appear to have been inadvertent. the fact that MCI

voluntarily brought at least one (and apparently both) of these mistakes to the Commission's attention -- 24 n.13, supra -- bolsters our conclusion that it did not engage in any intentional deceit with respect to its unauthorized operation.

39. With respect to MCI's filing of a license application for a construction permit that had expired three days previously, we have also been presented with no evidence of intentional deception on MCI's part. Indeed, because notification to the Engineer-in-Charge with respect to this site was given prior to expiration of the construction permit, and the license application was apparently executed prior to expiration at the construction permit, the late filing of the license application appears to have been inadvertent. (See Opposition at Exs. D-12.1, D-12.2)

40. We also have been presented with no evidence that MCI intentionally

sought to deceive the Commission in failing to notify the Commission in its construction permit applications of two unresolved frequency coordination disputes or including statements indicating that coordination had been successfully completed. In one of the instances, only MCI's frequency coordinator contractor, not MCI itself, was aware of the dispute. In the other instance, MCI appears to have believed in good faith that notification was not required because the dispute did not relate to the need for remedial changes in its technical proposal. In this second instance, it appears that coordination between MCI and United Video had been substantially completed prior to the filing of MCI's application, except that MCI had not yet provided "unequivocal assurance" to United Video's satisfaction that any future interference problems would be taken care of by MCI. (See Petition at Att. A. 40). The matter was brought to the

Commission's attention in a petition to deny filed by United Video in which United Video "reserve[d] the right" to request that MCI's authorization be conditioned on the resolution of any such future interference if the unequivocal assurance was not forthcoming from MCI. Id. The matter was speedily resolved when MCI provided the requested assurance. (Opposition at Ex. B-4) While MCI should have notified the Commission of the remaining unresolved dispute--See 29, supra -- its belief that such notification was unnecessary was not unreasonable in light of the circumstances and suggests that MCI had no intent to deceive the Commission. Moreover, the fact that in each instance MCI proceeded expeditiously to resolve the dispute strongly suggests the absence of any deceptive intent or motive, and, in the absence of any evidence of intent to deceive, we conclude that MCI did not engage

in misrepresentation or evidence a lack of candor to the Commission that would cause us to doubt its propensity for truthfulness as a licensee.

41. TeleSTAR has presented no examples of any inaccurate statements made to the Commission by MCI in connection with its violation of local ordinances. In addition, since these violations apparently did not affect MCI's site availability, it does not appear that MCI had an affirmative obligation to bring these matters to our attention. In any event, we have no evidence before us of any intent to deceive in this regard, and therefore find no misrepresentation or lack of candor by MCI.

42. Finally, with respect to MCI's checking of the wrong box regarding the use of federal lands on four occasions, we accept MCI's explanation that such action was inadvertent. Not only has TeleSTAR presented us with no evidence regarding

intentional deceit on MCI's behalf, but the absence of any underlying substantive rule in this area suggest the absence of any motive for deception.¹⁶

43. In sum, after a careful review of TeleSTAR's allegations and MCI's responses, we find no evidence that MCI intended to deceive the Commission with regard to any of the violations we have found herein. Accordingly, in line with the standards set forth above, while we admonish MCI to exercise more care in its dealings with the Commission, we conclude that there has been no misrepresentation or lack of candor by MCI.

H. Favoritism to MCI

44. TeleSTAR makes a number of unfocused, unsupported allegations that the Commission and its staff are in some fashion exhibiting favoritism toward MCI at the expense of TeleSTAR, in violation of the Equal Protection Clause of the U.S.

Constitution. Much of this argument (e.g., Petition at 22-27) appears to be merely an improper collateral attack on our treatment of TeleSTAR's construction permit applications. See TeleSTAR, Inc., FCC 86D-30, released April 18, 1986, aff'd, 2 FCC Rcd 5 (Rev. Bd. 1987), remanded, FCC 87-374, released Dec. 3, 1987. Our disposition of this proceeding is unrelated to the matters at issue in TeleSTAR. Therefore, we will not address here matters relating to the TeleSTAR proceeding.

45. TeleSTAR also argues that Commission staff has improperly granted STAs to MCI on a rapid basis. The staff treatment of MCI's STA applications has, however, been no different than those of numerous other carriers and has been consistent with the requirements of Section 309(f) of the Communications Act and Section 21.25 of our Rules.¹⁷

I. Revocation

46. Section 312(a) of the Communications Act states that we "may" revoke a station license for, inter alia, "false statements knowingly made" to the Commission, conditions coming to our attention that would warrant denial of an initial application, "willful or repeated failure to operate substantially as set forth in the license," or "willful or repeated violation" of the Communications Act or our Rules. 47 U.S.C. 312(a) (emphasis added).

47. As we have stated previously, initiation of revocation proceedings through an order to show cause, as permitted by Section 312(a), "is, of course, wholly subject to our discretion." Tulsa Cable Television, 68 FCC 2d 869, 877 (1978).

"Pursuant to the legislative intent behind 47 U.S.C. 312, . . . the Commission has complete discretion, after considering

allegations of noncompliance with our rules, even prima facie evidence of violations, to determine not to issue orders to show cause" Id. Indeed, within our "broad discretion in this area, the Commission can refuse to issue an order to show cause based upon the petition of a third party even if it is determined that a violation of Commission rules exists." Humboldt Bay Video Co., 56 FCC 2d 68, 71 n.9 (1975). See also C. J. Community Services, Inc. v. FCC, 246 F, 2d 660, 664 (D.S.C. Cir. 1957) ("When a violation of the Act has been shown, the Commission may revoke a station license, but under 312(b), it also may impose a lesser sanction.").18

48. In exercising our discretion under Section 312(a), we do not believe it is appropriate to initiate revocation proceedings in this case. MCI's isolated violations,19 while not to be condoned, do not in our view justify license revocation.

We note, in this regard, that we find no evidence of misrepresentation or lack of candor on MCI's part or any intention to violate our Rules or the Communications Act.²⁰ Indeed, MCI's violations appear, in general, to be inadvertent. Moreover, MCI has been forthright in its responses to the Commission.

J. Notice of Apparent Liability

49. While we do not believe MCI's isolated and apparently inadvertent violations justify institution of revocation proceedings, we nevertheless admonish MCI to exercise more care in carrying out its responsibilities as a Commission licensee. We also conclude that monetary sanctions are appropriate. Accordingly, for those violations which have occurred during the previous year, and are therefore actionable under Section 503(b) of the Communications Act, we are hereby issuing a Notice of

Apparent Liability for forfeiture in the amount of \$10,000.21

50. Of the various MCI violations discussed above, only two are actionable under the Section 503(b) statute of limitations: (1) MCI's premature construction at its Chico site (Sacramento/Chico route), at which, in February, 1987, it mounted three antennas on its tower four days prior to receiving Commission authorization for such construction; and (2) MCI's continued unauthorized construction at its Sidewinder site (Las Vegas/Dominguez Hills route), at which, for the past year, it has retained two antennas mounted on its tower without prior Commission approval. In each case, MCI has constructed in violation of Section 319(a) of the Communications Act and Sections 21.3(b) and 21.7(a) of our Rules.

51. MCI's violations are both willful and repeated as defined in Section

503(b)(1), 22 and imposition of a forfeiture is therefore authorized under Section 503(b)(1). In determining the amount of the forfeiture to be imposed, we take into account "the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. 503(b)(2). Applying this standard to the premature/unauthorized construction at issue here, we determine that a forfeiture in the amount of \$10,000 for MCI's actionable violations is appropriate.

III. ORDERING CLAUSES

52. ACCORDINGLY, it is ordered that the "Petition for Revocation of FCC Authority for MCI" filed by TeleSTAR, . Inc. and its principals IS DENIED.

53. IT IS FURTHER ORDERED, pursuant to section 503(b) of the

Communications Act of 1934, 47 U.S.C. 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. 1.80, that MCI Telecommunications Corporation IS APPARENTLY LIABLE FOR FORFEITURE in the amount of \$10,000, for premature and/or unauthorized construction in violation of Section 319(a) of the Communications Act, 47 U.S.C. 319(a), and Sections 21.3(b) and 21.7(a) of the Commission's rules, 47, 47 C.F.R. Secs. 21.3(b), 21.7(a).

54. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. Sec. 1.80(f)(3), that MCI TeleCommunications Corporation may, within 30 days of this notice, pay the full amount of forfeiture in the manner provided for in Section 1.80(h) of the Commission's Rules, 47 C.F.R. Sec. 1.80(h), or may file a response showing why forfeiture should not be imposed or should be reduced.

55. IT IS FURTHER ORDERED that a copy of this Order and Notice of Apparent Liability for forfeiture shall be sent by certified mail, return receipt requested, to: MCI Telecommunications Corporation, 1133 19th Street, N.W., Washington, D.C. 20036..

FEDERAL COMMUNICATIONS
COMMISSION

H. WALKER FEASTER, III
Acting Secretary

Footnotes to Document

1 TeleSTAR's petition was filed on March 25, 1987. Because petitions to revoke filed by third parties are not cognizable under the Communications Act or our Rules, consistent with our prior practice, we will treat TeleSTAR's petition as an informal request for action under Section 1.41 of our Rules, 47 C.F.R. Sec. 1.41. See KSDK, Inc., 93 FCC 2d 893 (1983).

2. MCI holds various point-to-point microwave authorizations under Part 21 of the Commission's Rules.

3. MCI's opposition was filed June 22, 1987. TeleSTAR filed a reply to opposition on July 23, 1987. MCI filed a second opposition, accompanied by a motion for its acceptance, on August 14, 1987. Section 1.45(b) of the Rules specifies that replies to oppositions should be limited to discussions of matters raised in the opposition; discussion of new matter is not authorized. However, in light of TeleSTAR's discussion of new matter in its reply, we grant MCI's motion.

4 Part 21 was recently revised. See Revision of Part 21 of the Commission's Rules, FCC 87-284, released Sept. 25, 1987. In this Order, we refer to Part rule sections as they existed prior to revision, since those were the rules in effect at the time of the behavior at issue in this proceeding.

5 TeleSTAR's allegations, as well as MCI's responses, are set forth in more detail in the discussion section below.

6 Section 319(a) of the Act provides that "no license shall be issued under the authority of this Act for the operation of any station unless a permit for its construction has been granted by the Commission." 47 U.S.C. Sec. 319(a). Section 319(d) exempts common carriers from the

construction permit requirement unless the Commission decides otherwise, which it has for carriers, such as MCI, operating under Part 21.

Section 21.3(b) of our Rules tracks Section 319(a) of the Act. 47 C.F.R. Sec. 21.3(b). In addition, it provides for waivers of the construction permit requirement and also states: "No construction or modification of a station may be commenced without a construction permit, a modified construction permit, or other authority issued by the Commission for the exact construction or modification to be undertaken, except as may be specifically provided for in other sections of this part." In this connection, Section 21.25(a) of the Rules permits the grant of Special Temporary Authority (STA) to construct and/or operate microwave facilities. Section 21.7(a) tracks the pre-construction authorization requirement of Section 21.3(b) and requires grant of a construction permit prior to commencement of construction.

7 In general, we base our description of TeleSTAR's claims on its supporting evidence, not simply on its own characterizations of that evidence. In this instance, we note that only with respect to one site (Spartansburg), does TeleSTAR provide any evidence that tower construction began prior to December, 1982.

8 With respect to TeleSTAR's claim that the Commission granted MCI an STA for more sites than it had requested (Petition at 8), TeleSTAR makes reference only to MCI's October 8, 1985 request for an STA for two sites (Petition at ATT. A.41), while the STA granted for the entire route apparently related to a separate MCI request, filed October 18, 1985. (Petition at Att. A.26.)

9 While MCI's storage of replacement radio equipment at its antenna sites was permissible, installation of such equipment prior to receiving construction

authorization would contravene our rules. Even if such a violation occurred (which is not clear from the facts presented to us), it would not affect our decision not to initiate revocation proceedings and would not subject MCI to forfeiture because of the one-year statute of limitations. See 47 U.S.C. Sec. 503(b)(6)(B).

10 In any event, MCI has explained that construction occurring in 1986 at this site (e.g., erection of a prefabricated building) related to use of this site as part of its Houston, Texas to Baton Rouge, Louisiana fiber optic route.

11 TeleSTAR initially provided a list of 23 instances of such alleged unauthorized operation, stating that its list included 21 separate instances. Subsequently, it stated that only 20 separate instances were involved.

12 The gaps between the scheduled dates for commencement of service and the date the Form 436s were filed generally ranged from three days to approximately two months, although in two instances the gaps were substantially higher (eight months, four years). In one additional instance, TeleSTAR alleged a one-year gap, but it mistakenly identified the year involved.

13 MCI also states that it explained the error with respect to this route when it filed its license application (Opposition at 20 n.13), although no supporting evidence of this fact is provided. In addition, according to our own records, it appears that, with respect to MCI's Hancock, Illinois to Downers Grove route, MCI's construction permit expired three days prior to its filing its license application on June 4, 1982, and that no accompanying request for reinstatement of its construction permit was made. MCI's license application for this route was, however, subsequently granted, and there is no evidence that, apart from the late filing of the license application, any unauthorized activity occurred.

14 Although not directly applicable to common carriers, the character qualifications standards adopted in the broadcast context can provide guidance in the common carrier area as well. See 1 FCC Rcd at 424; see also A.S.D. Answer Service, Inc., 1 FCC Rcd 753 (1986) (applying the broadcast character standards in a common carrier case). In any event, to the extent we were not to use broadcast character standards for guidance in this case, MCI's violation of local ordinances would be of even less significance. See Arizona Mobile Telephone Co., 93 FCC 2d 1147, 1153-55 (1983).

15 For example, while MCI originally planned to request authorization for eight antennas on its Chico tower, it ultimately sought and received authorization for only six. The additional two were nevertheless mistakenly installed by personnel who apparently did not realize that they were no longer to be included in the system. (See Opposition at 37-38 & n.26.) Since MCI had no intent to operate these two antennas, there appears to be no motive to deceive the Commission.

16 TeleSTAR's further suggestion in its Reply (at 5-8) that MCI engaged in additional misrepresentation by failing to bring to the Commission's attention in its Opposition to TeleSTAR's Petition matters first raised in TeleSTAR's Reply is a non sequitur. MCI cannot be faulted for having investigated only those allegations previously raised by TeleSTAR and for not having disclosed or explained in its Opposition allegations first raised in TeleSTAR's Reply.

17 We also note that the staff's grant of recent MCI applications conditioned on the outcome of this proceeding was entirely appropriate. See Reply at 10-11.

18 In contrast to the Section 312(a) standard, under Section 309(e), we are required to designate for hearing an application for an initial authorization or

for renewal if there is a "substantial and material question of fact" raised with respect to whether grant of the application would serve the public interest, convenience and necessity. See Citizens for Jazz on WRVR v. FCC, 775 F. 2d 392, 394-95 (D.C. Cir. 1985). We note, however, that even if we were evaluating TeleSTAR's allegations under Section 309(e) of the Act, we would find no basis for initiating revocation proceedings based on the facts before us. The isolated violations at issue here do not warrant the inference that MCI is not qualified to be Commission licensee. In addition, with respect to those allegations for which we find no violations, we would also conclude, if applying the Section 309(e) standard, that no substantial and material question of fact have been raised that would require a hearing to determine whether such violations occurred.

19 We note that MCI has over 1700 microwave authorizations. In our discussion above, we conclude that MCI has engaged in improper premature and/or unauthorized construction on four routes, engaged in unauthorized operation on two routes, filed a license application to cover a construction permit that had expired three days previously, failed to disclose unresolved frequency coordination disputes on two occasions and incorrectly checked the wrong box regarding use of federal land on four occasions.

20 Compare Pass Word, Inc. v. FCC, 673 F.2d 1363, 1365 (D.C. Cir.) cert. denied, 459 U.S. 840 (1982) (upholding revocation revocation misrepresentations to the agency") (emphasis in original); TeleSTAR, Inc., FCC 87-374, released Dec. 3, 1987.

21 Section 503(b)(6)(B) prohibits us from imposing a forfeiture penalty on common carriers for violations occurring more than one-year prior to issuance of the Notice of Apparent Liability. Given the violations

found herein, we would have imposed the maximum forfeiture permitted under the ACT -- \$20,000 -- if the statute of limitations had not already run on most of the violations.

22 Imposition of forfeiture is authorized for either willful or repeated acts. 47 U.S.C. Sec. 5034(b)(1). Here, however, MCI's actions were both willful (it took the action involved) and repeated (the violations were repeated over more than one day). See, e.g., Hale Broadcasting Corp., 79 FCC 2d 169 (1980); Pond Branch Telephone Co., 53 RR 2d 803, 804 (Comm. Car. Bur. 1983).

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

FCC 89-132

In the Matters of

TeleSTAR, Inc. Applications for)
Authority to Construct New)
Common Carrier Point-to)
-Point Microwave Radio)
Stations (CC Docket No. 85-202;)
Files Nos. 1743 CF-P-85;)
through 1757 CF-P-85))
)
Petition for Revocation of Operating)
Authority for MCI TELECOMMUNICATIONS)
CORPORATION Revisited)
)
Petition for Revocation of Operating)
Authority for WESTERN)
TELE-COMMUNICATIONS, INC.)

ORDER

Adopted: April 27, 1989;

Released: April 28, 1989

By the Commission:

1. By letter dated August 9, 1988,
the Subcommittee on Oversight and
Investigations, Committee on Energy and
Commerce, U.S. House of Representatives
(Subcommittee), informed the Commission that
it was conducting an inquiry into the

above-captioned proceedings. By letters from the Chairman dated September 9, 1988, September 16, 1988, and February 28, 1989, the Commission provided copies of certain documents requested by the Subcommittee and declined to provide copies of certain other documents, e.g., non-public, deliberative documents. By letter dated April 3, 1989, the Subcommittee requested that the Commission provide copies of the previously-withheld documents, and also stated that it would be necessary for the Subcommittee staff to conduct interviews with various Commission personnel. In addition, the General Accounting Office (GAO) has commenced an informal inquiry that relates in part to these proceedings.

2. All of these proceedings are "restricted" adjudicatory proceedings under the Commission's ex parte rules. See 47. C.F.R. Sec. 1.1208.1 These rules prohibit communications relative to the merits or

outcome of a proceeding, made either to or from Commission decision-making personnel, unless, if written, they are served on the parties or, if oral, the parties have an opportunity to be present. See 47 C.F.R. Secs. 1.120(a), 1.1202(b), 1.1208(a).

3. Compliance with the commission's ex parte rules purposes of "ensur[ing] that the Commission's decisional processes are fair, impartial, and otherwise comport with the concept of due process" and of "deter[ing] improper communication and maintain[ing] the utmost public confidence in Commission proceedings" See 47 C.F.R. Sec. 1.1200(a). These rules are enforced strictly and waived only in extremely rare circumstances. A difficult question would be raised, for example, whether to waive the ex parte rules where such waiver would merely facilitate a congressional investigation that was prompted by a general concern about the

substantive outcome of an adjudicatory proceeding. Here, however, subsequent to our decisions in these proceedings, the Commission was informed of specific allegations of possible misconduct by Commission staff.² In light of these specific allegations of possible misconduct, as well as assurance from congressional staff that the investigation is concerned only with the possibility⁶ that agency misconduct affected our decisions and not with the substance of those decisions themselves, we believe that it is appropriate for the Commission to facilitate congressional exercise of its oversight powers with respect to the integrity of the Commission's processes.

4. Accordingly, in order to permit the interviews requested by the Subcommittee and to provide access to the previously-withheld documents requested by the Subcommittee, the Commission is hereby

waiving its ex parte rules in these proceedings to the extent set forth herein. Specifically, the Commission will permit Commission personnel to respond to all questions from the Subcommittee (and the GAO) in connection with their inquiries³ and will provide access to the Subcommittee (and, if requested, to the GAO) to the previously-withheld documents.⁴ This waiver⁵ is permissible under the Administrative Procedure Act (APA), which provides that the APA's ex parte restrictions (which apply here to CC Docket No. 85-202) do "not constitute authority to withhold information from Congress." 5 U.S.C. Sec. 557(d)(2).

5. In order to protect the due process rights of the parties to these proceedings⁶ and in order to comply with the ex parte requirements of the APA,⁷ the Commission is not waiving those portions of its ex parte rules that prohibit communications regarding the merits or

outcome of the proceedings that are transmitted from the Subcommittee or the GAO to Commission decision-makers. Neutral questioning by the Subcommittee or GAO staff is permissible; if, however, the Subcommittee or GAO staff conducting the interviews expresses a view, directly or indirectly, to Commission decision-making personnel as to the merits or outcome of the proceeding, the Commission decision-maker to whom the view is expressed must file a memoranda with the Managing Director reporting any such expression of views. See 47 C.F.R. Sec. 1.1212(b)8 Any such memoranda will be served on the parties to the relevant proceeding and placed in a public file associated with, but not a part of, the record in that proceeding. See 47 C.F.R. Sec. 1.1212(d),(e); 5 U.S.C. Sec. 557(d)(1)(C). As an additional mechanism for protecting the due process rights of the parties, the Commission is requesting that,

until the pending court appeals and any subsequent proceedings are completed, the Subcommittee and GAO not make available to others any information relating to the merits or outcome of the proceedings that it garners from the interviews or the previously-withheld documents.

6. The Commission finds that good cause exists for waiver of its ex parte rules as set forth above and that such waiver will serve the public interest. See 47 C.F.R. Sec. 1.3, 1.1200(a). In addition, this Order constitutes Commission approval, pursuant to 47 C.F. R. Sec. 0.463 and 19.735-206, for disclosure, by current and former Commission personnel,⁹ to the subcommittee and GAO of information regarding the above-referenced proceedings in connection with the Subcommittee or GAO interviews and for access at the Commission's offices by the Subcommittee (and GAO if at the Commission's offices by

the Subcommittee (and GAO if requested) to documents previously withheld by the Commission.

7. Accordingly, IT IS ORDERED that the Commission's ex parte rules ARE WAIVED to the extent set forth above.

8. IT IS FURTHER ORDERED that the disclosure of information to the Subcommittee on Oversight and Investigations, Committee on energy and Commerce, U.S. House of Representatives, and the General Accounting Office, as set forth in this order, IS AUTHORIZED.

FEDERAL COMMUNICATIONS
COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

1 Because they are pending before the United States Court of Appeals for the District of Columbia, see Nos. 88-1153, 88-1419, 88-1420, 88-2445, 88-1144, and 89-1156 (D.C. Cir.), the proceedings remain subject to the Commission's ex parte rules. 47 C.F.R. Sec. 1.1208(a).

2. See Complaint, TeleSTAR, Inc. v. MCI Communications Corp., No. 89-C-0068-S (D. Ut. 1989), served on the Commission on

January 31, 1989, as an attachment to "Amendment to the Docketing Statements" in D.C. Cir. Nos. 88-1153, 88-1419 and 88-1832. Compare TeleSTAR, Inc. "Reply to WTCI's June 10, 1988 Response -- On Who Owns the Tower on its Sodrac Repeater Site," filed June 27, 1988. The Commission initiated its own informal investigation as a result of these specific allegations. The investigation revealed no evidence that the Commission's processes have in any way been tainted.

3 The interviews shall be conducted in accordance with the procedures agreed to by Subcommittee staff -- namely, that all interviewees will be permitted to have counsel present and to tape record the interviews. In addition, as discussed in paragraph 5, infra, the interviewers have agreed to attempt to phrase their questions neutrally so as not to express views on the merits of the proceedings.

4 The Subcommittee staff (or the GAO, if requested) will be permitted to review the documents at the Commission's offices. To the extent, after such review, they believe any particular documents relate to agency misconduct, they will be provided copies of such documents.

5 Because the Common Carrier Bureau participated in CC Docket No. 85-202 as a party, not as a decision-maker, the Commission's ex parte rules do not apply to it with respect to that hearing proceeding. Accordingly, a waiver is unnecessary to permit ex parte communications between Common Carrier Bureau staff and the Subcommittee with respect to the CC Docket No. 85-202 hearing proceeding.

6 See, e.g., Koniag, Inc. v. Andrus, 580 F 2d 601 (D.C. Cir. 1978); Pillsbury v. FTC, 354 F 2d 952 (5th Cir. 1966).

7 See 5 U.S.C. Sec. 557(d)(1)(A). The APA "prohibitions on exparte communications relative to the merits apply to communications from Members of Congress . .

7 See 5 U.S.C. Sec. 557(d)(1)(A). The APA "prohibitions on ex parte communications relative to the merits apply to communications from Members of Congress" H.R. Rep. No. 880-Part I, 94th Cong., 2d Ses. 21-22 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 2183, 2203. As noted, the APA ex parte restrictions apply to CC Docket No. 85-202.

8 The Subcommittee and GAO are being advised that any such expression of views will trigger the disclosure requirements under our ex parte rules. Accordingly Commission decision-making personnel being interviewed need not separately so advise the Subcommittee or GAO staff, as otherwise required by 47 C.F.R. Sec. 1.1212(a).

9 In light of this order, former Commission personnel need not request approval pursuant to FCC Directive, FCC INST 1113.4, Att. 1, to participate in interviews with the Subcommittee or GAO in connection with the above-referenced proceedings.

CERTIFICATE OF SERVICE

I, David A. Gross, do hereby certify that I have this 11th day of July, 1989, sent by United States mail, postage prepaid, a copy of the foregoing Errata to Reply Brief of the Appellant to the following:

Constance L. Dupre'
U.S. Court of Appeals
Room 5423
Third and Constitution Avenue, N.W.
Washington, D.C. 20001

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Secretary
Federal Communications Commission
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David A. Gross /s/

David A. Gross

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	CC Docket
the Application of	)	No. 85-202
)	
TeleSTAR, Inc.	)	File Nos. 1743
	)	CF-P-85
For Authority to	)	through 1757
Construct New Common	)	CF-P-85
Carrier Point-to-Point)	
Microwave Radio Stations.)		

TO: The Commission

COMMENTS ON PETITION FOR RECONSIDERATION

Pursuant to Section 11.106(g) of the

Commission's Rules, 47 C.F.R. Sec. 1.106(g),
the Chief, Common Carrier Bureau,
respectfully submits these Comments on
Petitions for Reconsideration filed by
TeleSTAR, Inc. (TeleSTAR) in the
above-captioned proceeding.¹

I. INTRODUCTION

In a Memorandum Opinion and Order,
FCC 87-374 (released December 3, 1987)
(Remand Order), the Commission remanded this
proceeding for further hearings on
TeleSTAR's qualifications with instructions
to the Presiding Administrative Law Judge to

expedite proceedings and to issue a Supplemental Initial Decision. The Commission, noting that the proceeding a single applicant and that denial of TeleSTAR's applications would inhibit the growth of competition in microwave services between the affected cities, said it could neither grant nor deny the applications because the "record [was] filled with gaps, inconsistencies and numerous unanswered questions." Id. at para. 27. The Commission further stated that the burden of proof with respect to TeleSTAR's qualifications remain on TeleSTAR. Id.

Presiding Judge Walter C. Miller subsequently issued prehearing orders which contemplate thirteen days of additional hearings to begin on May 2, 1988, involving at least twelve individual witnesses, as well as seven categories of additional witnesses, to address the concerns raised in the Remand Order. See Further Prehearing

Order, FCC 87M-3240 (released December 10, 1987) (Further Prehearing Order, FCC 87M-3298 (released December 17, 1987) (Supplemental Prehearing Order). Still, Judge Miller indicated his view that TeleSTAR's principals had already "said all they had to say, all they could say." Further Prehearing Order at para. 6 n.5.

II. PETITION FOR RECONSIDERATION

In its petition, TeleSTAR requested that the Commission reconsider its Remand Order and, based on the record already established, grant TeleSTAR's applications and determine whether or not a forfeiture should be assessed. TeleSTAR maintains that sufficient evidence has already been presented to support a decision to grant or deny the applications. It argues that there is no indication that there is any relevant and material evidence which could be adduced which has not already been adduced. Therefore, it contends that the

Commission should affirm the Review Board's decision upholding the denial of its applications and issue its own decision predicated on the established record.

TeleSTAR points out that it is already in Chapter 11 bankruptcy proceedings and states that it does not have the financial means to participate in a remanded hearing. A final Commission order, TeleSTAR states, will at least allow it, if necessary, to test the Commission's action now by court appeal.

III. BUREAU'S COMMENTS

A. The established Record Supports A Finding That TeleSTAR's Applications Should Be Granted.

The Bureau believes that an ultimate decision on TeleSTAR's qualifications would not be enhanced or assisted by the receipt of additional evidence. The original hearings in this matter delved into the potential evidence in great detail and required the expenditure of

considerable resources by this agency and the parties. The Bureau conducted a thorough examination of the record in light of the concerns expressed in the Remand Order. We continue to believe, as we did in our Proposed Findings of Fact and Conclusions of Law (Dec. 19, 1985) that the record provides an adequate basis for a finding that grant of TeleSTAR's applications would serve the public interest. In remanding this case for further hearings, the Commission was particularly concerned with what it perceived as the absence of "substantial evidence" concerning what caused Noel and Doyle Stewart (TeleSTAR's principal officers and shareholders) to adopt their claimed belief that no preconstruction approval was required under the Commission's Rules. Remand Order at paras. 16-24. The Commission apparently found it significant that the Private Placement Memorandum drafted by the Stewarts in January 1984 "recognized the

need for a 'pre-build' order." Id. at para. 20. We have reviewed the record, including the extensive testimony of the Stewarts and Steve Amundsen (TeleSTAR's director of marketing), all of whom the Bureau found to be forthcoming, credible witnesses, and the contemporaneous documentary evidence adduced at trial. We believe that there is substantial support for finding that whatever their understanding of the rules at the time the Private Placement Memorandum was prepared, TeleSTAR's principals did in fact adopt the mistaken belief that no preconstruction approval was required as a result of discussion with representative of Spectrum Planning, Inc. See Proposed Findings at 4-12, 18, TR. 257-58, 263, 274-75, 327-28, 376-77, 380-82, 463-66, 469-70, 504-09, 530-31; TeleSTAR Ex. 1, op. 6-7, 16, Att. G at 3, Att. I at 4, Att. H at 1, 7. Moreover, while we are troubled by numerous conflicts and inconsistencies in

the record concerning TeleSTAR's understanding of Commission requirements, we believe that the misstatements in TeleSTAR's predesignation pleadings are as much the fault of counsel as of Noel Stewart and Amundsen.

The Commission also found significant discrepancies in the record as to when TeleSTAR discovered that its construction was in violation of Commission Rules. Remand Order at paras. 24-26.

TeleSTAR claims that it did not know that preconstruction was not permitted until it received a stop work order from its counsel, David Irwin of the firm Irwin and Lesse, on January 23, 1985. TeleSTAR Exs. 1 at 14, 23-24, 2 at 6; TR. at 331, 596-98.

Uncontroverted facts establish that the construction was completely shut down by January 25, 1985. See TeleSTAR Exs. 16-18. Irwin, however, testified at hearing that he did not learn about the preconstruction

until a telephone conversation initiated by Amundsen on January 29, 1985, four days after TeleSTAR had halted construction on January 25. The Bureau has reexamined the transcript as well as the documentary evidence and agrees that the record in this regard is inconclusive. However, we are persuaded that there will probably be no additional material and relevant facts to be produced at hearing that would assist the Commission in its determinations. Because we found both the Stewarts and Amundsen to be forthcoming, credible witnesses, we continue to believe that the Commission may reasonably find on the record that the stop order came from Irwin on January 23 since we do not believe that TeleSTAR would have halted the substantial construction on its own without an authoritative command from its communications counsel. See Proposed Findings at 35-38.

Thus, while the Bureau would agree that this is a close case, we believe that TeleSTAR has carried its burden of proof and the matter may reasonably be resolved on the existing record, consistent with appropriate administrative and judicial precedents, so as to warrant grant of TeleSTAR's applications, on the condition that it pay a substantial forfeiture. See Common Carrier Bureau's Comments on Application for Review (August 10, 1987); see also Eagle Telecommunications, Inc., FCC 85-362 [59 RR Id 1293] (released July 19, 1985) (unauthorized construction and operation of a cable system by a telephone company did not warrant disqualification but a forfeiture in the amount of \$20,00 assessed for willful or repeated violations). TeleSTAR is a new, inexperienced would-be-entrant to the common carrier microwave service and has no previous history of rule violations or other noncompliance. Moreover,

there are no suggestions in the record that its premature construction caused interference to existing facilities. The Bureau remains confident that the sanction of the payment of a substantial forfeiture will suffice to ensure that in the future TeleSTAR will operate its facilities in conformance with the pertinent rules and regulations of the Commission.

B. There Are No Additional Material and Relevant Facts To Be Produced At Hearing That Would Be Determinative To The Commission In Ruling On TeleSTAR's Qualifications.

Based on our review of the record, as well as our prior investigation of the prospective witnesses identified in the Supplemental Prehearing Order, we are persuaded that there are no additional facts to be elicited at hearing that would substantially aid the Commission its analysis of TeleSTAR's qualifications. It is

unlikely that the witnesses will have any better recollection of the facts at this time. Indeed, if they did, the testimony might be suspect. Thus, in the Bureau's view, any benefit which might result from further hearings at this time would be marginal at best. Moreover, there are certain equitable factors that warrant consideration. Given the fact that final Commission decision is some months away and TeleSTAR's financial status because of this litigation is in question as a result of its ongoing Chapter 11 bankruptcy proceedings, TeleSTAR maybe effectively precluded from establishing its qualifications as a result of additional, costly hearings that are not likely to adduce any additional material or relevant facts that would assist the Commission in ruling on TeleSTAR's qualifications. Under these circumstances, we believe that TeleSTAR's request that the

Commission rule on the established record is reasonable and should be granted.

Therefore, the Bureau urges the Commission to grant the petition for reconsideration, vacate the Remand Order and make a determination based on the established record whether TeleSTAR's applications should be granted. The Bureau believes that a just resolution of the proceeding warrants that the Commission grant the applications on the condition that TeleSTAR pay a substantial forfeiture.

Respectfully submitted,
Gerald Brock
Chief, Common Carrier Bureau

Date: 1-12-8

By: Gregory J. Vogt /s/
Gregory J. Vogt
Chief, Enforcement
Division

Howard M. Wilchins/s/
Howard M. Wilchins
Deputy Chief
of Enforcement Division

Thomas D. Wyatt /s/
Thomas D. Wyatt
Trial Attorney

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

March 3, 1988

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Re: CC Docket No. 85-202

Gentlemen:

Enclosed please find a revised draft of the letter the Enforcement Division proposes to send to the General Counsel of the FCC regarding or efforts to bring the TeleSTAR proceeding to a close.

It is understood that counsel for TeleSTAR will be advising the parties by Friday, March 4, 1988, of his client's position regarding the cessation of all hostilities, which is a critical element of any resolution. We would appreciate your prompt response as soon thereafter as possible.

Sincerely,

Howard M. Wilchins /s/
Howard M. Wilchins
Deputy Chief, Enforcement
Division
Common Carrier Bureau

Enclosure

IN THE UNITED STATES DISTRICT DISTRICT
COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

TELESTAR, INC., :
Plaintiff : Case No. 89
: C-0068-S
v. :
: DECLARATION OF
: JOHN WELLS KING
MCI COMMUNICATIONS :
CORP. :
WESTERN TELE- :
COMMUNICATIONS, :
INC., and WESTMARC :
COMMUNICATIONS, INC. :

-000-

I, John Wells King, declare:

1. I am a member of the law firm of
Haley, Bader & Potts in Washington, D.C. I
have represented MCI Telecommunications
Corporation ("MCI") in numerous proceedings
before the Federal Communications Commission
("FCC" or "Commission"). I am a member of
the District of Columbia Bar and the
Nebraska State Bar.

2. I make this Declaration in support of
MCI Communications Corporation's motion for
summary judgment in the above-captioned

case. I have reviewed the complaint filed by TeleSTAR, Inc. ("TeleSTAR") and am familiar with the allegations TeleSTAR has made concerning MCI and Western Tele-Communications Inc. ("WTCI").

3. I represented MCI in the FCC proceedings from which this law suit arises. Based on my involvement, I can state categorically that MCI did not misuse or corrupt those proceedings, and that MCI's conduct was at all times in full compliance with the FCC's rules and with the highest ethical standards.

4. MCI and TeleSTAR participated in two separate FCC proceedings: (1) proceedings concerning TeleSTAR's application for construction permits to build its microwave network; and (2) proceedings concerning TeleSTAR's petition to revoke certain of MCI's licenses.

5. The proceedings concerning TeleSTAR's application for construction permits had three basic phases.

- o First, the matter was referred by the Commission to an Administrative Law Judge ("ALJ") for an evidentiary hearing after WTCI challenged TeleSTAR's fitness to be a licensee. See WTCI' Petition to Dismiss (Exhibit 1 to this Declaration). MCI sent a letter supporting WTCI's position and played a limited role in the subsequent proceedings. See my letter to William J. Tricarico, FCC Secretary (Exhibit 2, to this Declaration). After the evidentiary hearing, the ALJ found that TeleSTAR was unfit to be an FCC licensee because of its repeated violations of FCC rules and lack of candor with the Commission See Exhibit 3 to this Declaration.
- o Second, TeleSTAR sought review of the ALJ' decision before the FCC Review Board, and after a full hearing, the Review Board upheld the ALJ's factual findings and conclusions of law. See Exhibit 4 to this Declaration.
- o Third, after a remand for additional evidence and findings (see Exhibit 5 to this Declaration) in which TeleSTAR refused to participate, the full Commission unanimously affirmed the decision of the ALJ to deny TeleSTAR its authorization and to dismiss TeleSTAR's applications. See Exhibit 6 to this Declaration.

6. In the proceedings initiated by TeleSTAR to revoke certain of MCI's FCC

authorizations, the FCC imposed a fine of \$10,000 for two inadvertent violations by MCI of the FCC's rules in the course of a massive construction program involving hundreds of projects and permits. The FCC found that MCI had been forthright with the Commission, and it expressly rejected TeleSTAR's contention that MCI's authorizations should be revoked. See Exhibit 7 to this Declaration.

7. FCC's rules against ex parte contacts in adjudicatory proceedings, 47 C.F.R., Sec. 1.1200 et seq., were in effect in both sets of proceedings, and MCI scrupulously observed them. To my knowledge, except for the settlement talks discussed in the next paragraphs of this Declaration, the only contact between representatives of MCI and the Commission and its staff on the merits of the issues in the proceedings concerning TeleSTAR's license applications was through formal filings before the Administrative Law

Judge, before the Review Board, and finally before the Commission itself.

8. In January 1988, the separate trial staff of the Common Carrier Bureau of the FCC initiated settlement talks. On behalf of MCI, I attended these talks, which took place in January and February 1988. FCC employees attended some of the settlement meetings. To my knowledge, Dale Brown did not attend or participate on the FCC's behalf.

9. MCI did not request that the FCC or the trial staff initiate or participate in settlement negotiations. The FCC employees who attended the meetings explicitly stated that the Commission was not a party to the talks and was not bound by any agreement that the parties might reach. MCI understood that the FCC had the right to deny TeleSTAR's applications if MCI withdrew its opposition as part of a negotiated settlement, and that the FCC had the right

to grant TeleSTAR's applications if MCI maintained its opposition after the failure of settlement negotiations. MCI never attempted to persuade the FCC to take a different position with respect to the effect of any potential settlement on the FCC's consideration of TeleSTAR's applications.

10. In these settlement negotiations, MCI indicated that it would not stand in the way of a settlement between the trial staff and TeleSTAR. When the trial staff and TeleSTAR sought MCI's imprimatur in a settlement providing for licensing a company that the ALJ and Review Board found unfit and that MCI considered unfit, MCI declined to give such an imprimatur without an assurance from TeleSTAR of a complete cessation of hostilities in all forums. At the outset of the negotiations, MCI was not aware that TeleSTAR wanted to reserve the right to initiate antitrust litigation

challenging MCI's successful advocacy in the FCC proceedings, but MCI's expressed desire for a complete cessation of hostilities at least implicitly covered TeleSTAR's release of any such claims. MCI explicitly requested such a release as soon as TeleSTAR made its intentions in absolute good faith.

Pursuant to 28 U.S.C. Sec. 1746, I declare under penalty of perjury that the foregoing is true and correct.

John Wells King /s/
John Wells King

Executed: May 3, 1989



⑦
No. 89-1770

Supreme Court, U.S.

FILED

JUN 18 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

TELESTAR, INC.,
v. *Petitioner,*

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, *et al.,*
Respondent,

MCI TELECOMMUNICATIONS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF IN OPPOSITION FOR RESPONDENT
MCI TELECOMMUNICATIONS CORPORATION**

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June 18, 1990

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PARENT AND SUBSIDIARIES

The parent of MCI Telecommunications Corporation is MCI Communications Corporation. The only subsidiaries of MCI Telecommunications Corporation are wholly owned subsidiaries.

THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS
JANUARY 1950

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No. 89-1770

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v.

FEDERAL COMMUNICATIONS COMMISSION
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Respondent.

On Petition for a Writ of Certiorari to the
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for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT
MCI TELECOMMUNICATIONS CORPORATION

STATEMENT OF THE CASE

The proceeding below is summarized in the brief of the United States.

SUMMARY OF ARGUMENT

The decision below in the District of Columbia Circuit is not in conflict either with a decision of the Ninth Circuit or of any other court. No new question of law is presented. The decision's treatment of the assignment of evidentiary burdens is in accordance with well-established precedent. All decision makers below from the Adminis-

trative Law Judge, the FCC's Review Board, the Commission itself and the court of appeals reached the conclusion that TeleSTAR's applications should be denied, and there exists no reason to doubt their unanimous judgment.

ARGUMENT

I. There Was No "Cut-Off" of Appellate Review, No Question of Exhaustion of Administrative Remedies, and No Conflict with the Ninth Circuit

The court of appeals did not deny review of the FCC decision finding TeleSTAR unqualified, as TeleSTAR asserts. It conducted a "full review" with briefing and oral argument.¹ Although the frivolous nature of TeleSTAR's appeal did not require issuance of a published opinion,² the court explicitly found that it "had no cause to disturb the Commission's final order denying TeleSTAR's applications"—although these words are excised by TeleSTAR in the version of the court's opinion produced at page 12 of its appendix. After its review on the merits, the court sustained the FCC's conclusion that TeleSTAR had failed to carry its burden of proof.

TeleSTAR's discussion of the doctrine of exhaustion of administrative remedies is irrelevant. There is no connection, let alone inconsistency, with decisions addressing the doctrine of exhaustion of administrative remedies, such as *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675 (9th Cir. 1988), in which a district court suit was dismissed because the tribe had failed to exhaust its remedies within the Department of Interior. Here TeleSTAR was found unqualified to become a licensee by an Administrative Law Judge, by the Commission's Review Board, and by the full Commission in the course of the normal

¹ App. at 11.

² See Rule 14(c) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit.

adjudicatory process. In reviewing this unanimous agency conclusion, the court of appeals found no basis for overturning it.

II. TeleSTAR Was Repeatedly Found Unqualified

The Administrative Law Judge concluded that³:

. . . TeleSTAR engaged in substantial premature construction of fifteen Common Carrier Point-to-Point Microwave Radio Stations between Salt Lake City, Utah and Denver, Colorado. Such premature construction was carried out in wilful violation of 47 C.F.R. § 21.3(b). In engaging in such premature construction TeleSTAR's principals have lacked candor with their own shareholders, openly lied to the Bureau of Land Management, and intentionally misrepresented material facts to the Commission. Consequently they cannot be considered an honest and reliable applicant. They are not qualified to be a Commission licensee, and a grant of their applications would therefore not serve the public interest, convenience, and necessity.

The FCC's Review Board unanimously concluded that⁴:

We ourselves conclude that the overwhelming weight of demonstrative evidence . . . supports the ultimate conclusion of the instant I.D. that T/S [TeleSTAR] and its principals made serious and numerous misrepresentations to the FCC, and displayed an egregious lack of candor in this proceeding. We further conclude that the record evidence supports the ALJ's determination that T/S denials of knowledge of the need for direct FCC authority to construct its radio system are incredible. . . . We squarely agree with the primary findings of the ALJ, and with his in-

³ *TeleSTAR, Inc.*, FCC 86D-30 at ¶ 91 (Initial Decision CC Docket No. 85-202) (released April 18, 1986).

⁴ *TeleSTAR, Inc.*, 2 ⁷ CC Rcd 5, 13 (¶ 24), 15 (¶ 30), and 17 (¶ 34) (Rev. Bd. 1987).

ferences as to the motives of T/S and its principals. . . . We find in T/S a gross lack of respect for candor and a flagrant disrespect for the FCC's rules and processes.

The Commission unanimously concluded that ⁵:

. . . [W]e have closely examined the record in this proceeding. Based on that record, it is clear that TeleSTAR violated the rules by its premature construction. TeleSTAR also submitted patently false information as a result of Noel Stewart's deficient certification practices. It also made misrepresentations of material facts and exhibited a lack of candor: (1) in its applications which falsely represented that TeleSTAR proposed to construct its facilities, (2) in its pleadings filed March 21 and September 20, 1985, which contained inconsistent and contradictory explanations for its premature construction, and (3) in its principals' self-serving testimony concerning their understanding and knowledge of the Commission's construction permit requirement, which was unsubstantiated and rebutted by other record evidence. The record therefore requires us to conclude that TeleSTAR is not qualified to be a licensee.

III. TeleSTAR Engaged in Unauthorized Construction

47 C.F.R. § 21.3 provides that no construction of a common carrier station "may be commenced without an authorization from the Commission." TeleSTAR certified that it was familiar with Part 21 of the FCC's Rules that includes this requirement.⁶ TeleSTAR admitted that it engaged in construction at 13 of 15 sites before filing any applications.⁷ The ALJ found that TeleSTAR had

⁵ *TeleSTAR, Inc.*, 3 FCC Rcd 2860, 2866 (¶ 49) (1988).

⁶ *TeleSTAR, Inc.*, 50 Fed. Reg. 27055, 27057 (¶ 13) (Designation Order) (1985).

⁷ *Id.* at ¶ 8. At six sites, towers, antennas, waveguides, and transmitter housings had been constructed.

"virtually completed construction at the majority of its fifteen sites."⁸ While the Commission has permitted preliminary steps such as site clearance, pouring of concrete footings for a tower, installation of a new power line and on-site storage of radio equipment and other steps not having an "intrinsic" radio communication use "related to the proposed facility," it has never condoned the wholesale construction of towers and installation of antennas without authorization of any kind, such as was undertaken by TeleSTAR.⁹

TeleSTAR makes the claim, not made below, that the "FCC had effectively relegated the FCC construction authority to a ministerial act."¹⁰ It relies for this proposition on a letter with respect to an AM broadcast station in Alaska, *King Country Broadcasters*, 55 Rad. Reg. (P&F) 2d 1591 (1984). The FCC letter in that case, however, affirmed that Congress had not intended to sanction preconstruction of broadcast facilities and there had not, contrary to TeleSTAR's assertion, been construction of a radio antenna. In the broadcast field, moreover, there is no counterpart to 47 C.F.R. § 21.3, which governs common carrier construction.¹¹

In *Eagle Telecommunications, Inc.*, 59 Rad. Reg. (P&F) 2d 1243 (1985), *recon. denied*, 59 Rad. Reg. (P&F) 2d 1249 (1986), the Commission did not condone, as Tele-

⁸ *Initial Decision*, FCC 86D-30 at ¶ 66.

⁹ *Patton Communications Corporation*, 81 FCC 2d 336, 338 (1980); *Childress Broadcasting Corp.*, 24 Rad. Reg. (P&F) 669 (1962).

¹⁰ TeleSTAR petition at 21.

¹¹ Nor is TeleSTAR's reading of *King* even correct with respect to broadcast construction. In *Christian Broadcasting of the Midlands, Inc.*, 103 FCC 2d 375 (1986), *reconsideration denied*, 2 FCC Rcd 6404 (1987), the Commission corrected any such misreading of *King* and emphasized that "Congress did not intend this agency to license an entire station which had been built prior to receiving a construction permit."

STAR suggests, the unauthorized construction by a telephone carrier of less than a mile of cable television facilities to eight homes, but rather imposed a forfeiture of \$20,000.¹² The Commission cited *Eagle* in its final decision with respect to TeleSTAR and noted that if the TeleSTAR case were “merely a case of premature construction, a lesser penalty such as a monetary forfeiture might be appropriate” but concluded that, in addition to the violations of Section 21.3, TeleSTAR was guilty of misrepresentations and lack of candor.¹³

IV. TeleSTAR's Misrepresentations Warranted Denial of Its Applications

TeleSTAR repeatedly made misrepresentations of material facts and showed a pervasive lack of candor.¹⁴ Under *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946), these actions justify its disqualification.¹⁵

¹² No authorization for radio was involved, and therefore no requirement for a construction permit, and *Eagle* defended itself by pointing out that it made no charge for service to the eight homes. *Eagle Telecommunications, Inc.*, 54 Rad. Reg. (P&F) 2d 1125, 1128 (1983).

¹³ 3 FCC Rcd at 2866 (¶ 47).

¹⁴ *TeleSTAR, Inc.*, 3 FCC Rcd 2860, 2862-2866 (1988); *TeleSTAR, Inc.*, 2 FCC Rcd 5, 6-12 (Rev. Bd. 1987).

¹⁵ See also *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1139 (D.C. Cir. 1985); *Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 840 (1982).

V. It Was Appropriate for TeleSTAR to Bear the Burden of Proof

The agency imposed the burden of proof upon TeleSTAR¹⁶ and TeleSTAR failed to meet it.¹⁷ TeleSTAR was uniquely capable of presenting evidence with respect to any excuse that might exist for its admitted construction of substantial facilities without authorization. With respect to its misrepresentations and lack of candor, it was uniquely able to explain its own behavior. The Tele-

¹⁶ *TeleSTAR, Inc.*, 3 FCC Rcd 2860, 2862 (§ 14) (1988). In its petition, TeleSTAR claims that the agency did not impose the burden of nonpersuasion upon it with respect to the issues designated. 47 C.F.R. § 1.254, however, places upon the applicant the burden of both introduction and of proof unless the designation order provides otherwise. The Designation Order did not even mention any other party in the context of assigning burdens. Note 19 to the Designation Order, omitted in the material quoted in TeleSTAR's petition, explicitly provided that the applicant had both burdens where alleged misconduct was within its peculiar knowledge. The order cited *Granbury Communications Co.*, 68 FCC 2d 966, 969 (1978), recognizing that the applicant should bear the burden of proof "where the operative facts are peculiarly within the knowledge of the applicant," such as issues of misrepresentation and lack of candor, even if facts may initially have been brought to the agency's attention in a petition to deny filed by another party.

¹⁷ Although TeleSTAR refers, at page ii of its brief, to the burden question as the "critical" one, it is clear from TeleSTAR's conduct at the hearing, in its Findings and Reply Findings, Exceptions, and oral argument before the Review Board, that it too presumed that it had all burdens of persuasion. Only after it had failed in all other lines of argument did it drop a final footnote to its Application For Review with the Commission raising the issue. TeleSTAR failed to seek reconsideration of the Hearing Designation Order, failed to argue in its Proposed Findings and Reply Findings that it had only the burden of persuasion on the ultimate issue and failed in its Exceptions to the Initial Decision, filed with the Review Board, to argue that ALJ Miller had mis-assigned the burdens. According to 47 C.F.R. Sec. 1.277(a), which governs the filing of exceptions to initial decisions, "[a]ny objection not saved by exception filed pursuant to this section is waived."

STAR actions at issue were all recent ones involving the words and deeds of its principals.

The basic fact of unauthorized construction had already been admitted prior to the designation order and the question during hearing centered around (1) the affirmative defense by TeleSTAR that it was allegedly ignorant of the requirement for Commission authorization and that such alleged ignorance relieved it of responsibility and (2) the various misrepresentations made and lack of candor manifested by TeleSTAR. Its own state of mind, upon which it sought to premise its ignorance defense, was peculiarly within its knowledge. The Commission correctly concluded that "because the nature of these matters concerns facts within the peculiar knowledge of TeleSTAR's principals, it is not unfair or unreasonable to require TeleSTAR to present evidence concerning the activities of its principals or to carry the burden of proving that its principals were proceeding in good faith."¹⁸

McCormick observes "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue."¹⁹ This principle has been applied to hearings pursuant to 47 U.S.C. § 309(e) to require an applicant to bear the burden of proving matters within his peculiar knowledge. *Citizens*

¹⁸ *TeleSTAR, Inc.*, 3 FCC Rcd at 2862 (¶ 14).

¹⁹ *McCormick on Evidence*, Section 337 (3d ed.). Similarly, 29 Am. Jur. 2d, *Evidence*, Section 131 observes "where the evidence is entirely within the possession of one of the parties to a case, or where a particular fact necessary to be proved rests peculiarly within the knowledge of one of the parties, it is his duty to produce it or to come forward with the proof." See also *Campbell v. United States*, 365 U.S. 85, 96 (1961); *United States v. New York, New Haven and Hartford Railroad Co.*, 355 U.S. 253, 256 n.5 (1957); *Selma, Rome and Dalton Railroad Company v. U.S.*, 139 U.S. 560, 568 (1891); *Greenleaf's Lessee v. Birth*, 31 U.S. (6 Pet.) 302 (1832); *Lindahl v. Office of Personnel Management*, 776 F.2d 276, 280 (Fed. Cir. 1985); *Celanese Chemical Co. Inc. v. United States*, 632 F.2d 568, 575 (5th Cir. 1980), *cert. dismissed*, 453 U.S. 950 (1981).

Committee To Save WEFM v. FCC, 506 F.2d 246, 266 (D.C. Cir. 1974)²⁰

The explicit provision in 47 U.S.C. § 309(e) that ordinarily "the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant" also reflects the more general principle that an applicant for a governmental privilege bears the burden of proving his fitness to hold the privilege.²¹ Applicants for authority from the FCC bear the burden of proof with respect to issues pertaining to their qualifications.²² TeleSTAR sought a valuable privilege from the Commission to use the radio spectrum. Under 47 U.S.C.

²⁰ In *Catoclin Broadcasting Corp. of New York*, 4 FCC Rcd 2553, 2554 (1989), the Commission imposed the burden of proof with respect to issues of misrepresentation and lack of candor on a licensee whose renewal application was challenged. In *Midwest Radio-Television, Inc.*, 18 FCC 2d 1011, 1013 (Rev. Bd. 1969), the Commission placed the burden of proof on the applicant with respect to various anticompetitive practices charged by a competitor because "much of the information sought under the designated issues is peculiarly within the knowledge of the applicant." In *United Telephone Co. of Ohio*, 26 FCC 2d 417, 421 (1970), both the burden of introduction and the burden of proof were placed on United Telephone with respect to charges of anticompetitive practices brought by a competing mobile service operator. In *West Coast Media, Inc.*, 61 FCC 2d 577, 585 (1976), both burdens were placed upon the applicant with respect to issues relating to its past programming "since information regarding KDIG's past programming is within the licensee's knowledge." In *Christina Communications*, 2 FCC Rcd 1971, 1975 (¶ 27) (Chief, Common Carrier Bureau, 1987), the burden of proof on a real party in interest issue, originally raised in a petition to deny, was placed on the applicant.

²¹ See generally *Lindahl v. Office of Personnel Management*, 776 F.2d 276, 278-279 (Fed. Cir. 1985); *Harrison v. Richardson*, 448 F.2d 638, 639 (6th Cir. 1971); *Celebrezze v. Bolas*, 316 F.2d 498, 500 (8th Cir. 1963); *Eschbach v. Contractors, Pacific Naval Air Bases*, 181 F.2d 860, 864 (7th Cir. 1950).

²² *Courier Post Publishing Co. v. FCC*, 104 F.2d 213, 215 (D.C. Cir. 1939). See also *Deep South Broadcasting Company v. FCC*, 347 F.2d 459, 464-65 (D.C. Cir. 1965).

§ 308(b), it is the responsibility of the applicant to provide the facts relevant to its "character, and financial, technical, and other qualifications." ²³

VI. The Findings That TeleSTAR Was Unqualified Were Not the Result of the Commission's Interlocutory Order After Hearing

TeleSTAR largely ignores the Commission's detailed and repeated conclusions regarding its conduct and focuses, instead, upon an interlocutory order in which the Commission gave TeleSTAR a second chance to prove the contentions it failed to prove in the hearing.²⁴ Far from expressing doubt as to the merits of the decisions below, this remand order expressed the conclusion that "[w]ithout further hearings to resolve the unanswered

²³ Undoubtedly the act contemplates that the applicant for a license shall establish those qualifications for the license which would make its grant serve the public interest, and necessarily presupposes a frank, candid, and honest disclosure of the facts as to its qualification. . . .

Great Western Broadcasting Ass'n v. FCC, 94 F.2d 244, 246 (D.C. Cir. 1937).

²⁴ While playing down the actual decisions at the agency, TeleSTAR emphasizes in its petition the opinions expressed at various times by the separated trial staff of the Common Carrier Bureau Enforcement Division that appeared in the role of a party at the hearing. The Bureau trial staff did not, however, file exceptions to ALJ Miller's Initial Decision, and in fact, filed a reply brief to TeleSTAR's exceptions *supporting* the initial decision.

The case, we thought, turned on the credibility of witnesses, and the ALJ has primary responsibility for determining whether the testimony should be credited. He found it was not credible, and we did not, and do not, believe that there is substantial evidence, sufficient to warrant overturning his decision.

Bureau Reply Brief to Exceptions, p. 2. The Bureau concluded that: "Statutorily, under Section 309(e) of the Communications Act, the applicant has the burden of proof. The ALJ found the burden had not been met, and we think that he was warranted." *Id.* at 9-10.

questions regarding TeleSTAR's premature construction, we would have no basis to reverse the conclusions of both the ALJ and the Review Board that TeleSTAR is unqualified to be a licensee." ²⁵ Commissioner Dennis dissented from this interlocutory order and "would have denied TeleSTAR's applications". ²⁶

The two members favoring a remand appear to have been disinclined to deny any common carrier application that was not mutually exclusive with the proposal of another applicant. They tried to give TeleSTAR every possible opportunity to make its case while recognizing that to date "TeleSTAR does not appear to have met its burden of proof." ²⁷ They explained in the remand order that ²⁸:

The burden of proof was on TeleSTAR to establish its qualifications, and here that required TeleSTAR to present persuasive evidence of why it went from knowing about the FCC's preconstruction rule to thinking that the rule had changed. Yet TeleSTAR failed to present any evidence of who the sources were who supposedly led Noel and Doyle Stewart to develop erroneous interpretations of the Commission's rules. No such witnesses were called to testify. When the Stewarts testified concerning their misunderstanding of the rules, they failed to identify the sources or describe any communications which resulted in those erroneous interpretations.

If any such witnesses, in fact, existed, it would have been a simple matter to have introduced their testimony at the supplemental hearing TeleSTAR was granted for this purpose. TeleSTAR chose, however, as the Administrative Law Judge described it, to "thumb its nose at

²⁵ *TeleSTAR, Inc.*, 2 FCC Rcd 7352, 7356 (¶27) (1987).

²⁶ *TeleSTAR, Inc.*, 64 Rad. Reg. (P&F) 2d 397, 402 (1987).

²⁷ *TeleSTAR, Inc.*, 2 FCC Rcd at 7353 (¶ 10).

²⁸ *Id.* at 7355 (¶ 21).

the Commission's remand order" and failed to present any new evidence.²⁹

VII. There Was No Disparity of Treatment with Respect to MCI

There is no basis in TeleSTAR's claim of a disparity of treatment in the Commission's decision with respect to a "petition for revocation" it filed against MCI.³⁰ TeleSTAR built nearly an entire common carrier microwave network route without applying for an authorization of any kind and its principals committed repeated misrepresentations to the Commission. MCI's violations were minor technical ones³¹ made against a well estab-

²⁹ *TeleSTAR, Inc.*, FCC 88M-1113 at 3, n.3 (released April 5, 1988).

³⁰ Under FCC rules, there is no such thing as a "petition for revocation." Third parties have no rights to have a *licensed* carrier's authorizations revoked. The discretionary power to investigate alleged violations and revoke licenses rests solely with the FCC. *MCI Telecommunications Corporation*, 3 FCC Rcd 509, 513 (¶ 47) (1988), *aff'd TeleSTAR v. FCC*, 1990 WL 58394 (D.C. Cir.). Contrary to TeleSTAR's claim, Pet., p. 1, n.1, the Commission did not find "five instances of [MCI] making false statements on applications." Rather, the Commission found that MCI had inadvertently checked the wrong box on several application forms with respect to an outdated question on land ownership no longer relevant under agency regulations. The checking of the wrong box "although an incorrect statement, violates no substantive rule." *Id.* at 512 (¶ 34). Also contrary to TeleSTAR's claims (Pet., p. 9), the Commission did not fine MCI for violations of prior frequency coordination procedures. Although finding a technical violation of the rules because MCI had been told that all disputes had been resolved when they had not, the Commission refused to impose any sanction, concluding that: "While MCI should have notified the Commission of the remaining unresolved dispute . . . its belief that such notification was unnecessary was not unreasonable in light of circumstances and suggests that MCI had no intent to deceive the Commission." *Id.* at 513 (¶ 40).

³¹ The Commission found two actionable violations by MCI at two California microwave sites—one at which MCI had mounted

lished pattern of observance of the Commission's requirements and it was found not to have made any misrepresentations or shown any lack of candor.³²

The action with respect to TeleSTAR's application was more akin to the FCC's refusal to renew the licenses of a company that made repeated misrepresentations to the Commission, which was upheld in *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). In *WOKO*, the Court rejected an argument that deceptions of the type involved had not been uncommon and others had not been dealt with as severely, declaring, at 228, that:

The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.

Not only are the facts in the two cases totally different, the procedural mechanisms which Congress has established for the FCC in each are different. The question of TeleSTAR's qualifications was considered under the standards of 47 U.S.C. § 309 governing applications. The issues TeleSTAR attempted to raise against MCI in its petition for revocation were, under 47 U.S.C. § 316, matters committed to the agency's discretion and did not require the institution of a show cause proceeding.

three new antennas on a previously authorized tower four days prior to receiving FCC authorization and the other at which MCI's contractor had stored two unconnected antennas on a tower built for six other antennas authorized by the agency. MCI paid a forfeiture of \$10,000 for these violations.

³² Indeed, MCI had brought one of the two violations to the Commission's attention.

VIII. Abortive Settlement Discussions Are Irrelevant

TeleSTAR digresses far from the record of the proceeding to engage in a distorted portrayal of abortive settlement discussions among parties to the case that had no effect upon the agency's disposition of the case. The first exploration of settlement was before the Review Board and addressed whether a resolution might be achieved along the lines of the settlement in *A.S.D. Answering Service, Inc.*, 1 FCC Rcd 753 (1986), *recon. granted in part on unrelated matter*, 3 FCC Rcd 4213 (1988), in which a corporation removed all of the blame-worthy principals so that no prior misconduct would be attributed to the corporation's current board. The Stewarts, who control TeleSTAR, however, refused to step down to allow the TeleSTAR applications to be addressed in a manner similar to *A.S.D.*

After both the Review Board and Administrative Law Judge had found TeleSTAR unqualified and after the Commission had sent the case back to the Administrative Law Judge to give TeleSTAR a last opportunity to prove what it had failed to prove in the original hearing, a second set of settlement discussions took place. The parties were reminded that the Commission was not bound by, nor obligated to approve, any settlement reached. MCI was willing to stand aside while the trial staff and TeleSTAR sought to convince the Commission to accept a settlement whereby TeleSTAR would acknowledge its guilt, pay a forfeiture, and take steps to avoid any recurrence. When MCI was asked by other parties whether it would affirmatively join in sponsoring a settlement proposal that might result from the discussions, however, it was not prepared to consider such participation unless a complete settlement of differences was reached whereby TeleSTAR would cease its attacks upon MCI in other forums with respect to matters arising

from the same dispute.³³ This in no way prevented other parties from urging a settlement or precluded TeleSTAR from proving its case on the merits.

These discussions were not part of the record of the proceeding below³⁴ and had no effect on its outcome. As the district court observed in dismissing the antitrust claims filed by TeleSTAR against MCI and WTCI: "The Court is not moved from its decision by TeleSTAR's allegations regarding the settlement talks because the talks occurred after TeleSTAR's petition had undergone exhaustive administrative review."³⁵

³³ In response to MCI's limited participation in the TeleSTAR proceeding (MCI was designated as a party and ordered by the Administrative Law Judge to participate after it filed a two-page informal objection to TeleSTAR's belated applications), TeleSTAR launched a revenge campaign against MCI, which included: (1) the leveling of nearly a hundred accusations of FCC rule violations against MCI, only one of which proved actionable; (2) attempts to contact the President of the United States to have him intervene in the Commission's adjudication; (3) attempts to induce members of Congress to intervene; and (4) an attempt to intimidate MCI by showing it an antitrust complaint it later filed (but which has been dismissed for failure to state a claim upon which relief can be granted).

³⁴ TeleSTAR's mis-use of offers of compromise to settle a proceeding is inappropriate. See Rule 408 of the Federal Rules of Evidence and *Texas Eastern Transmission Corp. v. FPC*, 306 F.2d 345, 358 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963).

³⁵ *TeleSTAR, Inc. v. MCI Communications*, U.S.D.C. D. Utah, Docket No. C 89-68 C, Transcript of hearing of May 2, 1990, p. 19.

CONCLUSION

The Court should deny the writ of certiorari.

Respectfully submitted,

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(5)
No. 89-1770

Supreme Court, U.S.
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

TELESTAR, INC.

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION

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QUESTION PRESENTED

Whether applications for a common carrier microwave communications system were properly denied by the Federal Communications Commission on the basis of the applicant's misrepresentations and lack of candor.



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**BRIEF FOR THE FEDERAL RESPONDENT
IN OPPOSITION**

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 11-13) is unpublished, but the decision is noted at 886 F.2d 442 (Table). The decision of the Federal Communications Commission (Pet. App. 14-66) is reported at 3 FCC Rcd 2860.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1989. A petition for rehearing was denied on November 27, 1989. Pet. App. 7. The

petition for a writ of certiorari was filed on February 26, 1990 (corrected copy filed May 16, 1990). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, the responsibilities of the Federal Communications Commission include authorizing the construction and licensing of common carrier microwave communications systems. In this case, the Commission denied 15 applications by petitioner to construct such a system.

1. In January, 1985, petitioner filed 15 applications with the Federal Communications Commission for a common carrier microwave communications system to carry communications between Salt Lake City, Utah and Denver, Colorado. Shortly thereafter, an existing carrier, Western Tele-Communications, Inc. (WTCI) submitted a letter to the Commission alleging that petitioner had constructed most of its proposed facilities without first obtaining the Commission's authorization. Petitioner responded by admitting that it had already constructed substantial elements of its system. It asserted, however, that it had understood the Commission's rules to require Commission authorization only at the point when radio transmission equipment was installed. Petitioner submitted an affidavit from its president, Walter Stewart, stating that the information in its responsive pleading was true. 1 C.A. App. 1-38.

2. On June 21, 1985, the Chief of the FCC's Common Carrier Bureau, acting under delegated authority, issued a *Notice of Apparent Liability and Order Designating Applications for Hearing* (CC No. 85-202) [*Designation Order*]. 1 C.A. App. 141-150.

The order concluded that there were “substantial and material questions of fact concerning the circumstances surrounding the construction by [petitioner] and its subsequent application[s] to the Commission,” and designated issues to be addressed in a hearing. *Id.* at 147. The order noted that, even if petitioner had correctly read the FCC’s rules as requiring a permit only before the installation of radio transmission equipment, petitioner’s construction had progressed beyond that point before petitioner filed its applications. *Id.* at 145-146. The order specified that petitioner would have the responsibility of adducing evidence on the issues and of bearing “the burden of proof on the conclusory issues,” because of its “peculiar knowledge [of] the facts regarding the alleged misconduct.” *Id.* at 150 & n.19.

3. On September 20, 1985, before the hearing commenced, petitioner filed a Motion for Summary Decision. 2 C.A. App. 156-480. Petitioner argued that the *Designation Order* was based on a mistaken premise—that its explanation for the preconstruction was that it had read but misunderstood the FCC’s rules. *Id.* at 168-169. Attributing this explanation to its counsel, petitioner’s president now stated that he had not seen a copy of the Commission’s rules until shortly before he signed the applications and that even then he had only reviewed the technical aspects of the rules. *Id.* at 163-164, 188-189. Concerning the earlier affidavit by petitioner’s president attesting to the accuracy of petitioner’s first explanation, Walter Stewart now contended that he had signed that affidavit without ever seeing the underlying documents to whose accuracy he had purportedly attested. 3 C.A. App. 481. Petitioner now explained that its misunderstanding of the FCC’s rules was the result of informal discussions with frequency coordination

companies and equipment suppliers. 2 C.A. App. 162-163, 182-183.

4. The Administrative Law Judge (ALJ) denied petitioner's Motion for Summary Decision (3 C.A. App. 506-507), and, after holding four days of hearings, decided that petitioner's applications should be denied because petitioner was "not qualified to be a Commission licensee." *Id.* at 700. He determined that petitioner had engaged in premature construction (*id.* at 694); that petitioner had had knowledge of the Commission requirements (*id.* at 694-697); and that petitioner had engaged in misrepresentations and a lack of candor in its dealings with the Commission. *Id.* at 697-700.

5. In January 1987, the Commission's Review Board affirmed the ALJ's decision. 4 C.A. App. 887-901. The Board concluded that "the preponderance of the record evidence corroborates the ALJ's findings and conclusions for the proposition that [petitioner] has misrepresented material facts to the Commission and that its principals have demonstrated an egregious lack of candor with this agency in this proceeding." *Id.* at 887.

6. In December 1987, the Commission issued a decision in which it agreed with the Review Board and the ALJ on many matters, but remanded to allow petitioner to submit additional evidence. Pet. App. 74-109. The Commission first agreed that the burden of proof and of proceeding was on petitioner. The Commission noted that, under 47 U.S.C. 309(e), "[t]he burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.'" Pet. App. 82. The Commission

stated that the operative facts with respect to the issues in this proceeding were “peculiarly within the knowledge of [petitioner’s] principals,” and that the “burden is on [petitioner] to establish by a preponderance of the evidence both that it is qualified to be a licensee and that the public interest will be served by the grant of its applications.” *Id.* at 83. The Commission also agreed that “on the face of the record [petitioner] does not appear to have met its burden of proof” (*id.* at 84) and that “the record does not establish [petitioner’s] qualifications to be a licensee.” *Id.* at 105.

The Commission remanded the proceeding to the ALJ to afford petitioner a further opportunity to meet its burden. Pet. App. 105-106. The Commission identified several specific areas where it felt additional evidence would be helpful. It noted, for example, petitioner’s earlier claim that its principals were led to believe that they could lawfully undertake pre-permit construction as a result of discussions with frequency coordination companies and equipment suppliers. The Commission suggested that petitioner on remand should identify more specifically these alleged sources of its misunderstanding and present them as witnesses. Pet. App. 101. The Commission further pointed to a significant conflict between petitioner’s principals and its former counsel concerning the date when these principals spoke with counsel about a possible premature construction problem. *Id.* at 102-105. Similarly, the Commission observed that the record contained information which petitioner had prepared for submission to its potential investors and which evidenced an understanding on petitioner’s part of the FCC’s construction permit requirements; the Commission noted that petitioner had not adequately reconciled this information with its subse-

quent claims that it misunderstood the requirements of the FCC's rules. *Id.* at 96-97.¹

7. On remand, petitioner chose not to supplement the existing record. Accordingly, in April 1988, the ALJ dismissed petitioner's applications for failure to prosecute. Pet. App. 67-73.

8. In May 1988, the Commission affirmed the denial of petitioner's applications. Pet. App. 14-66. The Commission noted that it had issued the remand order from an "abundance of caution" and "to allow [petitioner] an opportunity to establish its qualifications." *Id.* at 19-20. The Commission further observed that, "[a]lthough we specifically found that [petitioner] failed to establish its qualifications to be a licensee on the basis of the present record[,] [petitioner] refused to present further evidence." *Id.* at 20-21. The Commission thus evaluated the administrative record before it and concluded, "When consideration is given to the full record in this proceeding, the preponderance of the evidence establishes that [petitioner] has both misrepresented material facts and exhibited a lack of candor in its prosecution of these applications." *Id.* at 21-22.

9. On September 22, 1989, the D.C. Circuit affirmed the Commission's denial of petitioner's applications. In its unpublished order, the court stated:

The Commission's remand order warned [petitioner] that, as the record then stood, the FCC had "no basis to reverse the conclusion of both the ALJ and the Review Board that [petitioner] is unqualified to be a licensee." Despite that

¹ Petitioner's appendix omits Commissioner Dennis's dissent, in which she concluded that no remand was necessary and that petitioner's applications should simply be denied. See 4 C.A. App. 953-954.

warning, and the reasonableness of the Commission's assignment of the proof burden to the applicant when "the operative facts are peculiarly within the knowledge of [that party]," [petitioner] chose to stand on the existing record. Under the circumstances here presented, we have no cause to disturb the Commission's final order denying [petitioner's] applications.²

ARGUMENT

Petitioner raises three objections: (1) the court of appeals' order was erroneous (Pet. 52-54); (2) the Commission's proceedings and decision were unfair (Pet. 56-62); and (3) the court of appeals' decision conflicts with other decisions regarding exhaustion of administrative remedies. Pet. 62-63. None of these objections is well founded, and none warrants review.

1. Petitioner's challenge to the court of appeals' order is apparently based upon a fundamental misconception. Petitioner contends that the court of appeals "[f]ail[ed] to grant review [i]n this case" (Pet. 55) and that the alleged "cutoff of judicial review" (Pet. 54) was impermissible. This suggestion is incorrect. Petitioner's principal argument in the court below, *i.e.*, that the Commission improperly placed upon it the burden of "nonpersuasion," was explicitly considered and rejected by the court of appeals. See App., *infra*. The court explained that it was entirely reasonable for the Commission to assign the burden of proof to petitioner because "the operative facts are peculiarly within [its] knowledge." *Id.* at 2a. After carefully considering petitioner's ar-

² Petitioner's appendix (at 12) omits an important phrase from the last sentence in the quoted passage. We have reprinted the order in its entirety in an appendix, *infra*.

guments, the court found that it had "no cause to disturb" the Commission's decision, including its allocation of burdens. *Ibid.* Thus, although petitioner may disagree with the result reached by the court of appeals, any assertion that it was denied judicial review is clearly mistaken.

2. Petitioner also raises scattered objections to the Commission's administrative process. It maintains that settlement negotiations were unfair and abusive. Pet. 44-47, 59-60. Contrary to petitioner's suggestions, the conduct of what turned out to be unsuccessful settlement negotiations in the presence of the FCC staff did not taint the administrative process, and the Commission did not punish petitioner for failing to agree to a negotiated settlement; the Commission rendered a decision in this case on the basis of the evidence in the record. Similarly, petitioner repeatedly points to positions taken by the FCC Common Carrier Bureau (Pet. 25, 39-40, 56); the recommendations of the FCC Common Carrier Bureau obviously were not binding on the ALJ, the Review Board, and the Commission, and did not foreclose their own evaluations of the record. Finally, petitioner repeatedly focuses on the FCC's decisions, in entirely separate proceedings, not to revoke the authorizations of MCI Telecommunications Corporation (Pet. 1-13, 57-58) and WTCI (Pet. 14-15, 49, 57-58).³ The propriety of these other decisions, of course,

³ In the MCI matter, petitioner filed two petitions with the FCC to revoke MCI's licenses to operate certain common carrier microwave facilities on the ground that MCI had prematurely constructed some of its facilities prior to obtaining FCC approval. The Commission concluded that MCI had indeed prematurely constructed some of its facilities and it imposed a monetary forfeiture of \$10,000 on MCI. *MCI Telecommunications Corp.*, 3 FCC Rcd 509, supplemented by 4

is not properly presented by this case, in which the Commission rejected petitioner's applications. To the extent that petitioner argues that the Commission's decision in this case was unfair because it treated petitioner more harshly than WTCI and MCI, it should be pointed out that, in the other proceedings, the Commission specifically held that there was no evidence that either WTCI or MCI had engaged in misrepresentation or a lack of candor in their explanations to the Commission. See *Western Tele-Communications, Inc.*, 3 FCC Rcd at 6405-6406; *MCI Telecommunications Corp.*, 3 FCC Rcd at 514. This difference from the Commission's finding with respect to petitioner's misrepresentation and lack of candor is clearly sufficient to distinguish those decisions.

3. Finally, petitioner's contention (Pet. 62-63) that the court of appeals' order conflicts with decisions from this Court and the Ninth Circuit regarding the exhaustion of administrative remedies is without merit. The basis of the alleged conflict is not clearly set forth in the petition, but petitioner apparently believes that the court of appeals concluded that petitioner had failed to exhaust administrative remedies. Pet. 62. In fact, neither the court of appeals decision nor the Commission order which it

FCC Rcd 7299 (1988). See also 3 FCC Rcd 3155, reconsideration denied, 3 FCC Rcd 6732 (1988). In the WTCI matter, similar charges were filed by petitioner, but the Commission found no evidence to support petitioner's claim of impermissible premature construction. *Western Tele-Communications, Inc.*, 3 FCC Rcd 6405 (1988). Petitioner appealed the denial of its petitions to the D.C. Circuit. In unpublished judgments, the court dismissed petitioner's appeals for lack of standing. *TeleSTAR, Inc. v. FCC*, 901 F.2d 1131 (D.C. Cir. 1990) (Table); *TeleSTAR, Inc. v. FCC*, 899 F.2d 1268 (D.C. Cir. 1990) (Table).

affirms relies upon, or even mentions, the exhaustion doctrine. Instead, petitioner's applications were rejected because, on the state of the hearing record, the preponderance of the evidence established that petitioner engaged in misrepresentations and lack of candor in its dealings with the Commission. Pet. App. 21-22.⁴ The significance of petitioner's failure to submit additional evidence was that, as the Commission had explicitly warned, it left the administrative record in a state on which petitioner could not possibly prevail. Thus the court of appeals' order clearly presents no conflict with any decision of this Court or any other court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General **

ROBERT L. PETTIT
General Counsel
Federal Communications Commission

JULY 1990

⁴ It is well settled that misrepresentation and lack of candor justify the Commission's denial of a license. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982). The integrity of the Commission's processes rests on its ability to rely upon the representations of its licensees. *RKO General, Inc. v. FCC*, 670 F.2d at 231.

* The Solicitor General is disqualified in this case.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1420, 88-1445

TELESTAR, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

MCI TELECOMMUNICATIONS CORPORATION,
WESTERN TELE-COMMUNICATIONS, INC., INTERVENORS

Appeal from an Order of the
Federal Communications Commission

[Filed Sept. 22, 1989]

JUDGMENT

Before: MIKVA, EDWARDS, and RUTH B. GINSBURG,
Circuit Judges.

This appeal was considered on the record from the Federal Communications Commission and on the briefs and oral arguments of counsel. Upon full review, the court is satisfied that appropriate disposition of the case does not warrant a published opinion. *See* D.C. Cir. R. 14(c).

The Commission's remand order warned TeleSTAR that, as the record then stood, the FCC had "no basis to reverse the conclusion of both the ALJ and the Review Board that TeleSTAR is unqualified to be a licensee." Despite that warning, and the reasonableness of the Commission's assignment of the proof burden to the applicant when "the operative facts are peculiarly within the knowledge of [that party]," TeleSTAR chose to stand on the existing record. Under the circumstances here presented, we have no cause to disturb the Commission's final order denying TeleSTAR's applications. It is therefore

ORDERED and ADJUDGED that the order from which this appeal has been taken be affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15(b)(2).

Per Curiam

For the Court:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE
Clerk